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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF WYOMING.

FROM ITS ORGANIZATION TO THE MARCH
TERM, 1878.

EXTRA ANNOTATED EDITION

E. A. THOMAS,
REPORTER.

Vol. 1.

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MAY TERM, 1870.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
MAY TERM, 1870.

THE WESTERN UNION TELEGRAPH COMPANY
v. MONSEAU.

EVIDENCE—VERDICT.—If there is evidence before a jury tending to prove the material allegations of the complaint, and sufficient facts to establish the cause of action, the verdict should be sustained, unless it appears to the appellate court that the jury has either misunderstood the evidence or that the jurors have been influenced by bias or prejudice. Where there is no evidence, however, to sustain the verdict, or where it has been found directly contrary to the evidence, it should be set aside and a new trial granted.

ERROR to the District Court for Laramie County.

This action was brought by Monseau, defendant in error, to recover of the Western Union Telegraph Company the sum of one thousand six hundred and ninety-six dollars and fifty cents and interest, for seven hundred and fifty-four telegraph poles alleged to have been sold and delivered to said company, at its request, for the price of two dollars and fifty cents for each pole. The answer contained a general denial, and the cause came on for trial before Chief Justice Howe and a jury.

Argument for Defendant.

The evidence introduced by the plaintiff directly tended to prove the allegation of the complaint, and that the telegraph poles mentioned therein were furnished by Monseau to said company in accordance with the terms of a contract made by one Martin Hogan, its authorized agent. The testimony on the part of the defense, while it, to a certain extent, corroborated the evidence of the plaintiff as to the delivery of the poles in question, tended to prove that Hogan was not authorized to make such contract on behalf of said telegraph company, and that he did not make such contract. Numerous exceptions were taken during the trial, but the principal one was to the overruling of the defendant's motion to set aside the verdict and for a new trial. In that motion but two errors were assigned, of which the second only was considered by the court, viz., "Because the evidence in the case was insufficient to sustain the verdict." A verdict was rendered for the plaintiff for one thousand nine hundred and eighty-three dollars and forty-eight cents, and judgment ordered thereon, and the case was taken by writ of error to the supreme court.

D. McLaughlin, for plaintiff in error, contended :

I. That there was not sufficient evidence to establish the fact that Hogan was the duly authorized agent of the company.

II. That the evidence was insufficient to prove that any contract was made between Hogan and the defendant in error, and cited: *Angell and Ames on Corp.* 286, 289; *Hayden v. Middlesex Turnpike Cor.*, 10 Mass. 403; *Martin v. Grant Falls Manuf. Co.*, 9 N. H. 51; *Paley's Agency*, 192, 202, 203, 204, 205; *Adrianee v. Roome*, 52 Barb. 399; *Paley's Agency*, 178, 179, 201; 2 Kent, 620 *et seq.*; *Hammond v. Mich. State Bank*, Walk. Ch. R. 214; *Story on Agency*, 166, 170, 172; *Smith's Mercantile Law*, 2d ed. 29.

E. P. Johnson, for defendant in error, urged that there was sufficient evidence adduced by the plaintiff in the court below to sustain all the material allegations contained in

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his complaint, and cited: Nash's Pr., New Trials; 18 U. S. Digest, New Trials; Story on Agency, secs. 52, 53, 54, 55, 56; Angell and Ames, 298; Story on Agency, secs. 73, 126, 127, 443; Redfield on Railways, 510.

By the Court, KINGMAN, J. This case came up on error from the first judicial district. The exception taken in the court below was to the ruling of the judge refusing to set aside the verdict, on the ground that there was not sufficient evidence to sustain a verdict for the plaintiff.

The law as given to the jury is not objected to by counsel for the defendant, and this court does not differ with counsel as to the law as now contended for by him. The only question here is, did the jury find their verdict without evidence, or against the evidence, so that it cannot be sustained.

The rule of law in this case is well settled. If there is reason to suppose that the jury have mistaken or misunderstood the evidence, or that they have been carried away by passion or prejudice, and thereby have done evident injustice to either party, it is the duty of the court to set aside their verdict and grant a new trial. But if there is evidence proper to be submitted to a jury on the issue before them, it is their province to weigh it; and it must be a very clear case, appealing very strongly to the conscience of the court, to induce or permit us to interfere with their decision. It is not sufficient that another jury might probably arrive at a different conclusion, nor that the court should be entirely satisfied with the verdict; if there is evidence proper for them to consider and tending to prove the issue presented, we must be satisfied with their judgment, unless it is made to appear that their judgment has been unfairly exercised.

In the case before us, there is material and pertinent evidence tending to prove the issue on the part of the plaintiff. This is met and contradicted by evidence on the part of the defendant; but we cannot say that it is fully overcome, or that injustice has been done by the verdict.

The ruling of the court below is sustained, the motion for a new trial overruled, and the judgment affirmed.

Statement of Facts.

THE TERRITORY OF WYOMING *v.* ANDERSON.

PRACTICE—CRIMINAL CASES.—A statute requiring that in cases of misdemeanor the name of the prosecuting, or other witness, shall be indorsed on the indictment, is merely directory, and not mandatory.

PERMISSION TO INDORSE.—Where the prosecuting attorney or foreman of the grand jury has failed to make such indorsement, permission will be given on trial to the prosecuting attorney to make such indorsement.

APPEAL from the First District Court for Laramie County.

The appellant was indicted at the September term, 1869, of the first district court, for keeping a disorderly house. The cause was tried before Chief Justice Howe and a jury. Upon the trial, when the witnesses were called on behalf of the prosecution, counsel for the defense objected to the testimony and evidence of the said witnesses, because their names were not indorsed upon the indictment as required by the statutes then in force. Whereupon the prosecutor asked leave of the court to indorse the names of said persons on the indictment as witnesses, which permission was granted, and the witnesses were examined over the objection of counsel for defense; other exceptions were taken not material to the decision of the case.

A verdict of guilty was rendered, and after a motion for a new trial had been made and overruled, the defendant was fined three hundred dollars and costs, and the defendant appealed to the supreme court.

J. M. Carey, for appellee.

Miller & Street, for appellant.

Judgment affirmed, and writ of procedendo awarded.

Statement of Facts.

JOHNSON *v.* MARION.

APPEAL—JUSTICES' COURT.—Upon an appeal taken from the court of a justice of the peace to the district court, if it appears that the bond filed is not in accordance with the requirements of the statute in such case made and provided, the appeal may be dismissed on motion, and judgment entered for the amount received in the court below.

MOTION.—Such motion may be made, although a notice of trial in the appellate court has been served by the party making the motion.

APPEAL from the Third District Court, for Carter County.

This cause was tried in justice's court before J. W. Stillman, J. P., and judgment was entered for the plaintiff for seventy-five dollars and costs, whereupon the defendant, Joseph Marion, appealed, under the statute, to the district court. On the eleventh of September, 1869, the cause was noticed by the attorney for the appellee in the district court. The notice of trial was as follows:

“Territory of Wyoming, County of Carter, ss: In the District Court, Third Judicial District. W. H. Johnson *v.* Joseph Marion. Notice of trial. To Joseph Marion: Take notice that the above entitled cause will be tried at the next term of the district court, to be held at the court-house in South Pass city, on the twenty-second day of September, 1869. M. C. Page, attorney for plaintiff.”

On the fifth day of October, 1869, counsel for said appellee made a motion in said court, Hon. J. W. Kingman, associate justice of the supreme court, presiding, to dismiss the appeal, on the ground that the bond was not in compliance with the statute, and that said appeal had not been properly perfected. The following is a copy of the notice of motion:

“Territory of Wyoming, County of Carter, ss: In the District Court, Third Judicial District. W. H. Johnson, plaintiff, *v.* Joseph Marion, defendant. The above-named defendant take notice that on the eighth day of October, 1869, I will move in open court to dismiss the appeal

Points decided.

granted in the above entitled cause, on the ground that said appeal has not been properly taken and perfected according to law. W. H. Johnson, by M. C. Page, his attorney."

Thereupon, said motion was granted, the appeal was dismissed, and judgment entered for seventy-five dollars, and costs of appeal, against the defendant, appellant, and over the objection of his counsel. The cause was then taken by the appellant to the supreme court on appeal.

E. D. Strunk, counsel for plaintiff, claimed:

I. That the service of the notice of trial was an appearance in the cause, and waived all defects in the bond, and that the cause was properly in the appellate court to be heard *de novo*.

II. That on the motion to dismiss, it was error to order judgment to be entered in the district court.

J. M. Casey and M. C. Page, for the appellee.

Judgment of the district court affirmed.

MARTIN & NUCHOLLS v. MOORE.

FOREIGN JUDGMENTS—PLEADING.—In an action upon a foreign judgment, an allegation in the complaint is sufficient if it states the name of the court in which such judgment was obtained, and that the same was a court of competent jurisdiction, without alleging the actions and proceedings thereof.

DEMURRER—PRACTICE.—Where the defendant's demurrer has been overruled, a reasonable time will be given him to answer, unless it appear that such demurrer was interposed in bad faith; but such time to answer will not be extended, except for causes over which the defendant could have had no control.

DISCRETION.—The matter lies entirely within the discretion of the court.

APPEAL from the First District Court for Laramie county.

Statement of Facts.

Two errors were assigned by appellant: 1. The overruling of his demurrer to plaintiff's complaint; 2. The refusal of the court to extend the defendant's time to answer.

The action was brought under the code of Dakota, and the complaint, after stating the title of the cause, proceeds as follows:

"The said plaintiffs complain of the said defendant, and allege that at the times hereinafter mentioned, Jacob Downing was a probate judge in and for the county of Arapahoe, in the territory of Colorado, having authority under and by virtue of an act of said territory, entitled 'An act concerning probate courts,' passed on the seventh day of November, 1861, to hold court, and having jurisdiction as such over actions where the amount in controversy does not exceed three hundred dollars.

"That on the fourth day of July, 1868, at the city of Denver, in the county of Arapahoe aforesaid, the plaintiff commenced an action against the defendant before the probate judge, by summons duly issued by said probate judge on that day, for the recovery of one hundred and thirteen dollars and twenty-five cents, for goods, wares and merchandise sold and delivered to the defendant by the plaintiffs at defendant's request, which summons was duly and personally served on the defendant; that such proceedings were had thereupon, that, on the sixth day of August, 1868, in said action the plaintiffs recovered judgment, which was duly given by said probate judge against the defendant for the sum of one hundred and thirteen dollars and twenty-five cents for said debt, and sixty-six dollars seventy-five cents costs: and plaintiffs further say that no part thereof has been paid.

"Wherefore, the plaintiff pray judgment against the defendant for the sum of one hundred and eighty dollars, the total amount of the said judgment, with the accruing costs, amounting to fifteen dollars, and the costs of this suit. Whitehead & Corlett, plaintiffs' attorneys."

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To which complaint the defendant interposed the following demurrer:

“District Court, Laramie County. Martin & Nucholls v. James Moore. Demurrer. Now comes defendant and demurs to the complaint herein for these reasons: 1. The complaint does not state facts sufficient to constitute a cause of action; 2. The plaintiff relies on the judgment pretended to have been recovered in Colorado Territory, and does not set out any copy of the record or show to the court in what manner the court in Colorado proceeded; 3. The complaint does not state the facts upon which plaintiff expects to recover, as distinguished from the conclusions of law. J. W. Cook, Miller and Street, defendant’s attorneys.”

The demurrer was overruled, and an exception taken by the defendant, who was given three days in which to file his answer.

Four days after the time thus allowed for answering had expired, the defendant, by one of his attorneys, filed a motion, asking for further time to answer, and an affidavit made by said attorney attempting to show that defendant had used due diligence, and that he had a just defense upon the merits, but he neither made the usual affidavit of merits nor set forth his means of knowledge, nor any of the grounds of defense.

He did show that he could not draw the answer without the presence of the defendant, but that said defendant had left town two days after the decision upon the demurrer, without notifying the attorney of his intended departure, and ignorant, as the attorney believed, of such decision.

Motion overruled and exception given to defendant. Default taken and judgment rendered for plaintiff for amount prayed for, and the case taken to the supreme court on appeal.

Cook, Miller and Street, for appellants.

Whitehead and Corlett, for appellees.

Judgment of the district court affirmed.

Statement of Facts.

LANNIER *v.* HAASE & FINN.

COLLINS *v.* DAVIS, SPRAGUE & CO.

LOWRY & UPTON *v.* DAVIS, SPRAGUE & CO.

PRACTICE—APPEAL.—An appeal must be perfected to entitle the appellant either to a stay of proceedings, or to a hearing on the appeal. Serving notice of appeal, and also filing in addition thereto a bond on appeal is insufficient unless the record has been properly taken to the appellate court. If the appeal has not been perfected the course for the appellee to pursue is by motion to dismiss the appeal.

APPEALS from the First District Court for Laramie County.

In these three causes the appellants having served notices of appeal, and filed bonds, took no further action therein until the supreme court convened, when the appellees respectively filed their several motions to dismiss the appeal, on the ground, especially, that such appeal had not been perfected by duly filing a transcript in the supreme court of the proceedings in the court below.

The motion was in each case granted, the court holding that it was then too late to bring up the records of the district court.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
JULY TERM, 1871.

THE UNION PACIFIC RAILROAD COMPANY *v.*
HAUSE.

DAMAGES, RAILROAD COMPANIES. —A railroad company is not responsible in damages to a person injured by an accident to a train passing over a portion of the road not completed, when said train is solely under the charge of the contractors building the road, and receiving all the profits thereof, that portion of the road still being unaccepted by the company. If any one is liable for damages it is the contractors, and not the railroad company.

IDEM.—Where suits are brought for injuries arising from accidents on railroads, exemplary, punitive or vindictive damages should not be awarded except in extreme cases. The general rule is, that sufficient damages should be given to fully compensate the plaintiff for his loss of time and suffering.

ERROR to the First District Court for Laramie County.

The following statement of the case fully presents the exceptions and points argued by counsel, and was filed by the judge who delivered the opinion of the court.

This was an action brought in the first judicial district of the territory of Wyoming, in the court holden in and

Statement of Facts.

for the county of Laramie, at the March term, A. D. 1870, Hon. Wm. T. Jones, associate justice and judge of the third judicial district of said territory, presiding and holding court in and for the first district. On the ninth day of May, A. D. 1868, the plaintiff in error and defendant in the court below, an incorporated company, by an act of congress under the name, style and title of The Union Pacific Railroad Company, and as such was operating a part of their road which was then completed from Omaha on the Missouri river in the state of Nebraska to the city of Cheyenne, in the territory of Wyoming, a distance of about five hundred miles; that the said company had under contract and nearly finished a portion of their said road west of the city of Cheyenne to and beyond the city of Laramie, in the county of Albany in said territory of Wyoming. That on the said ninth day of May, A. D. 1868, there were cars running on the said road from Cheyenne for the purpose of conveying freight to and beyond Laramie, with a box-car commonly called a "caboose" attached, in which, as well as upon said freight cars, passengers were carried for hire or pay. That Silas Hause, the defendant in error and plaintiff in the court below, did on the ninth day of May, 1868, take passage on the said train at Cheyenne in said territory, and upon the said Union Pacific Railroad, for the purpose of going to Laramie city. That Silas Hause had a ticket in the usual form of railroad tickets, which was handed to him by a friend, which said ticket was taken up by the conductor of the train after leaving Cheyenne. That some distance east of what is now known, and was then known, as Sherman station, some of the cross-ties of the said railroad became broken, the rails of said road parted, or as it was termed by the witnesses "spread," and several of the cars, including the one on which Silas Hause, the plaintiff below, was riding, ran off the track and down an embankment, some on the right and others on the left side of the road. That Silas Hause, the said plaintiff below, was riding on the top of a box or house-car—that when the acci-

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dent was occurring the said Silas Hause jumped off, and a barrel of molasses burst through the side of the car and struck the said Silas Hause on the leg, causing a serious compound fracture. That the said Silas Hause was taken charge of by certain surgeons, who dressed his wound, reduced the fracture, and subsequently brought him to Cheyenne, placed him in a hospital and took care of him for a considerable time, and until he was discharged as a convalescent.

The allegations set out in the petition of the plaintiff in the court below, Silas Hause, are that the defendant in the court below is and was on the ninth day of May, 1868, a corporation under the name, style and title of the Union Pacific Railroad Company, deriving and enjoying its corporate privileges by virtue of an act of congress. That on the ninth day of May, A. D. 1868, the said company was running a train of cars of a mixed character on their said road from Cheyenne to Laramie; that the said train carried freight for different persons, and also carried passengers, for which both freight and passengers they demanded and received pay or hire; that, although they may not have made any formal proclamation to that effect, yet they were known and recognized as common carriers; that in consequence of the imperfections of their road the train of cars on which Silas Hause was being conveyed was thrown off the track, and that the said Silas Hause received such injuries as to make him a cripple, laying the damages at ten thousand dollars.

This the defendant in the court below answers, admitting the first allegation, viz: that the said defendant was and is an incorporated company, but denying all the other allegations, and sets out specifically that the said railroad west of Cheyenne was, on the ninth day of May, A. D. 1868, in the hands of the contractor for building said road; and that if the said plaintiff in the court below was injured and entitled to damages, that he must look to the contractor and not to the said railroad company for them.

The case coming on for trial, after the plaintiff had sub-

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mitted his evidence, a motion was made by defendant's counsel for a nonsuit, which motion was overruled, and a verdict after trial was found for plaintiff for the sum of ten thousand dollars (\$10,000). A motion was then made for a new trial, and the exceptions taken both to the rulings of the court and to the verdict of the jury assigned as reasons for the new trial, and the motion was refused.

The case being certified to this court, the plaintiff in error assigns as exceptions, among other things: that the court erred in refusing defendant's motion for a nonsuit; that the verdict is not supported by the evidence, and cites various authorities, among which are: 1. To the error of the court in overruling defendant's motion for a nonsuit: *Stuart v. Simpson*, 1 Wend. 376; *Hartfield v. Roner*, 21 Wend. 615; *Morrison v. N. Y. & N. H. R. R. Co.*, 32 Barb. 568; *Sheldon v. Hudson River R. R. Co.*, 29 Id. 226; *Haring v. N. Y. & Erie R. R. Co.*, 13 Id. 9; *Carpenter v. Smith*, 10 Id. 663; *Spooner v. Brooklyn R. R. Co.*, 31 Id. 419.

The defendant in the court below also takes the ground, that the right to a writ of error is not waived by offering evidence in defense and proceeding with the trial after the motion for a nonsuit is refused, and cites: *Carpenter v. Smith*, 10 Barb. 663; *Reed v. Davis*, 3 Hill, 287; *Davis v. Hardy*, 6 Barn. & Cress. 225; 13 Eng. Com. Law R. 112; *Eddy v. Wilson*, Iowa, 259; *Fat v. Collins*, 21 Wend. 109; Burr. Prac. 239, 240; Wyoming Code, sec. 304; Idaho Code, sec. 311.

On the question of excessive damages the counsel for plaintiff in error cites among other authorities: Wyoming Code, sec. 311; *Jordan v. Reed*, 1 Iowa, 135; *Midland Pacific R. R. Co. v. McCartney*, 1 Neb. 398; Nebraska Code, sec. 314.

On the question of the verdict being unsupported by the evidence, is cited several authorities, which we do not deem it important to insert here. It is alleged that there was not sufficient evidence to show that the defendant in the court below was a common carrier, or that it was, as is claimed, a common carrier at the time the accident occurred on the

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railroad west of Cheyenne ; in fact, it is denied that it either was or had ever held itself out as such, nor had it sold a ticket to plaintiff or any other person ; nor in any manner, either for hire or pay or for any consideration whatever, undertaken to carry either freight or passengers. It is in evidence that the contractors had been running cars over the partially-finished road west of the city of Cheyenne, and continued so to do until either the eleventh day of May, A. D. 1868, or the eighteenth of the same month, the witnesses not being certain on which of the two days ; but no witness is called who proves that the plaintiff in error had undertaken to run cars west of Cheyenne on the ninth of May, 1868. The plaintiff in the court below does not, nor do any of the witnesses, state that he bought a ticket from the defendant below. It is in evidence, however, that the train which ran west of Cheyenne, and which, it is alleged, was run in the interests of the contractors, did not start from the depot of the plaintiff in error, but from a place several hundred yards west of where the trains were arriving and departing to and from Cheyenne and Omaha. It is also shown by an employee of the plaintiff in error, who kept its books, that no part of the earnings of the train which was run west of Cheyenne, prior to May 11, 1868, was received by the plaintiff in error, and there is no attempt to contradict either this or any kindred statement on the part of defendant in error. It is alleged by the plaintiff below that after he was injured that he was taken in charge by the surgeons of the defendant below, and taken to its hospital. This, while not deemed a very important statement, is, however, denied by the testimony of the surgeons, who say that the hospital did not belong to defendant below, but was a private enterprise of their own. It is alleged that the damages awarded by the jury, admitting that the facts as detailed justified them in finding any damages at all, were greatly in excess of what they should be, from the fact that damages should be in the nature of compensation for loss of time, interference with

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business and a reasonable allowance for bodily suffering, and cites: Civ. Code Wyoming, sec. 311; *Collins v. A. & G. R. R. Co.*, 12 Barb. 492; *Clapp v. A. R. R. Co.*, 19 Id. 461.

They therefore claim, as before stated: 1. Error in the court below in refusing to grant a nonsuit; 2. That there was not sufficient evidence to justify the jury in awarding any damages, but the verdict should have been for the defendant below; 3. That if the jury were justified in finding for plaintiff below, that then the damages found are greatly in excess of what the jury was justified in finding. There are several other exceptions urged by plaintiff in error which we have not referred to, one of which we will merely mention incidentally, and that is, that the court erred in refusing a new trial. The counsel for defendant in error reply to the foregoing, and claim that the fact that the plaintiff in error was the owner of the Union Pacific Railroad, and that cars were running on the ninth of May, 1868, is *prima facie* evidence of ownership in the road and cars, and that the burden of proof is thrown on plaintiff in error to rebut the presumption of careless management and liability for injuries sustained, and cite, among other authorities: 2 Red. on Railroads, 202, 1 Id. 532; 1 Hill. on Torts, 120, 125 and note; Reed on Carriers, 383; and that railroads are presumed to be common carriers, cites: 2 Hill. on Torts, 356.

As to the refusal of the court to sustain the motion for nonsuit, the counsel for defendant in error cites: 3 Barb. 419; 4 Seld. 497; and also authorities above cited. As to the question of excessive damages, cites: Sedg. on Damages, 712; Red. on Carriers, 315 *et seq.*

It is alleged, also, that the defendant in error is entitled to damages, not to be measured by the loss of time merely, but is entitled to recover such an amount as will reimburse him, not only for his loss in time, but for physical sufferings during the time of his confinement in the hospital, and on account of the permanent injury likely to ensue.

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W. R. Steele, for plaintiff in error.

W. W. Corlett, for defendant in error.

By the Court, FISHER, J. We are not prepared to say that the learned judge in the court below erred in refusing to grant the nonsuit prayed for by the counsel for the defendant in that court, as there was a *prima facie* case made out, both by the allegations contained in plaintiff's petition and the evidence submitted, to justify the court in proceeding to a fuller investigation than had been arrived at at the stage in evidence which had then been reached. At least one of the allegations in the petition had been admitted, and another one had been sufficiently sustained by the evidence to justify the court in eliciting further light. We think that the question of granting the nonsuit was entirely in the discretion of the court, and in this we are abundantly sustained in *Pratt v. Hull*, 13 Johns. 334; *Labar v. Roplin*, 4 N. Y. 549.

Had the motion for the nonsuit been submitted after all the evidence had been given both for plaintiff and defendant, we are inclined to think it might have met with a different response from the court. And this leads us to say that under the evidence given, and the case had gone to the jury under the instructions of the court, they should have found for the defendant, inasmuch as it is not shown that the defendant was a common carrier on that portion of the road upon which the accident occurred; but that on the contrary the cars were run by the contractors for the construction of that part of the road, managed by them and for their interest and profit; the defendant receiving no part of the revenues arising from the carrying either of freight or passengers. Hence we have no difficulty in arriving at the conclusion set out in the exception by the plaintiff in error that the verdict was not supported by sufficient evidence: but that it is not supported by any evidence at all. While we would hesitate in interfering with the verdict of

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juries, knowing that they are regarded as one of the “bulwarks of our Gothic liberties,” yet when they become so clearly wrong as in the case under consideration, they lose their title of “defenders of the rights of the citizen,” and become engines of oppression. The consideration of the fact of the total want of evidence submitted in this case, would in itself be amply sufficient to justify our conclusions, and lead us to wonder why the court below should have had any hesitation in granting a new trial.

But there is another exception urged which in itself ought to remand this case to the court whence it came for a reconsideration, and that is the question of the amount of damages awarded the plaintiff below by the jury. That the award is not only excessive but unreasonable, and were it not that we do not feel disposed to deal in terms of harshness, we might say that the jury either did not comprehend the obligation implied by their oaths, or else some demon of malevolence perverted their judgment so as to lead them into a vindictive spirit of persecution. Damages for injuries should be assessed in the nature of compensation. Juries should not presume that defendants have done intentional wrongs; that they willfully and maliciously inflicted injury upon any one unless the facts as developed on the trial irresistibly lead to such a conclusion. It is generally supposable that railroad accidents entail heavy losses upon the companies, and that they are not caused with any malevolent spirit of doing injury to the person or property of their patrons, and while they are legally responsible for injuries resulting from accident, they should not be punished in a vindictive spirit, unless it becomes necessary to do so to mete out to them measure for measure.

In the case before us, taking the allegations of the plaintiff below as the standard by which they were governed, allowing those allegations to be sustained, surely no defendant could have shown a truer spirit of benevolence than was exhibited by this plaintiff in error. Surgeons of acknowledged skill were promptly sent to the scene of accident, a

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hospital with all its benevolent appliances was thrown open for the plaintiff's admission and care, and everything which the promptings of humanity could suggest were supplied in alleviating his sufferings.

This, while it was no more than the precepts of Christianity prompt, is but another instance of the rule which generally prevails in similar emergencies; hence, the measure of damages should be regulated in the form of compensation, and not with a motive to punish the unintentional wrong-doer. Punitive or exemplary damages may be awarded in cases where personal injuries have been committed through wantonness or even gross carelessness of one party upon another, but there should be clear and unmistakable evidence of an intention to do the personal injury complained of, before the jury would be justified in finding an amount greatly beyond the actual loss sustained by the person injured.

In the case before us, we are very clear in the opinion that the amount of damages awarded by the jury is far in excess of the amount sustained, in a pecuniary view of the case; and this in itself, leaving out of the question the other points raised in the argument, would be enough to justify us in remanding the case for reconsideration.

We are, therefore, compelled to remand this case, and order a venire *de novo*, under the rules indicated in this opinion, and the decision of the court below is accordingly reversed.

Statement of Facts.

MURRIN v. ULLMAN.

PRACTICE—WRITS OF ERROR.—Under the provisions of the Wyoming code of procedure and the rules of practice established by the supreme court, parties intending to have the case reviewed in the supreme court, either by writ of error or petition in error, must, upon the trial, make his objections clearly and distinctly, briefly stating the grounds thereof. If overruled, an exception must be noted then and there.

BILL OF EXCEPTIONS.—After a motion for a new trial has been made and overruled by the court below, and an exception taken thereto, such party must have his bill containing all exceptions, together with the motion for a new trial, signed or allowed by the presiding judge of the court below.

IDEM.—If the plaintiff in error has not proceeded in accordance with the foregoing rules, it is correct practice for the defendant in error to move the court to dismiss the proceedings in error.

SURETIES—JUDGMENT.—Judgment may be entered against the sureties on a supersedeas bond in proceedings in error, without bringing suit thereon.

ERROR to the First District Court for Laramie County.

This cause came up from the district court on a writ of error, and what was termed a "transcript;" such transcript neither showing that any motion for a new trial had been made in the court below and overruled, nor that any bill of exceptions had been signed, nor in fact that any exceptions had been properly taken. The attorney for the defendant in error moved to dismiss the proceedings in error, "because the record does not disclose that any error of law occurred during the trial of said cause in the court below, to which the plaintiff in error excepted at the time." Said attorney also moved the court to affirm the decision of the district court, and to order judgment against the plaintiff in error and his sureties.

Thomas J. Street, for plaintiff in error.

Daniel McLaughlin, for defendant in error.

Both motions being granted, the proceedings in error were dismissed and the decision of the district court affirmed.

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GEER *v.* MURRIN.

PRACTICE—BILL OF EXCEPTIONS.—In proceedings in error the record of the court below must show that a bill of exceptions, containing the exceptions upon which the plaintiff in error relies, was duly made up and signed by the judge of said court within the time limited by statute.

IDEM.—After a motion for a new trial has been made and overruled by the court below and an exception taken thereto, such party must have his bill containing all exceptions upon which he relies, together with the motion for a new trial, signed or allowed by the presiding judge of the court below.

IDEM.—If the plaintiff in error has not proceeded in accordance with the foregoing rules, it is the correct practice for the defendant in error to move the court to dismiss the proceedings in error.

ERROR to the First District Court for Laramie County.

The record in this case from the district court does not show that any motion for a new trial was made and overruled, or that any bill of exceptions was signed. No record appears to have been made out in the usual form, but a paper on file, and indorsed a "transcript," contains among other matter the following: "Be it remembered that at the November term of the district court for the first judicial district, Wyoming Territory, the following judgment was rendered, to wit:

"Thomas D. Murrin *v.* John Geer. November term, 1870; Wednesday, November 23, 1870. This day came the parties by their attorneys, and thereupon came a jury, who having been duly impaneled, and sworn the truth to speak upon the issue joined upon their oaths, do say that the defendant is indebted to the plaintiff in the sum of six hundred and eight dollars, and it is thereupon considered and adjudged by the court that the plaintiff, Thomas D. Murrin, do recover of the defendant, John Geer, the said sum of six hundred and eight dollars, and costs of suit taxed to thirty dollars and seventy-five cents. J. H. Horne, Judge," etc.

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At the commencement of the proceedings in error, the plaintiff in error filed the following undertaking:

“First Judicial District Court, Thomas D. Murrin, plaintiff, v. John Geer, defendant. Whereas, on the twenty-third day of November, 1870, said plaintiff recovered a judgment in said court against said defendant for the sum of six hundred and eight dollars debt and thirty dollars seventy-five cents costs of suit; and the said defendant desires to appeal from the judgment of said court in said cause to the supreme court of said territory.

“Now, therefore, we, John Geer, as principal, and Stephen Bin and F. Schweickert, all of said county and territory, undertake and promise to the said plaintiff, that if said judgment be not reversed in said supreme court, that we will pay to said plaintiff the amount of said judgment and all costs and damages not exceeding fourteen hundred dollars. John Geer, S. Bin, F. Schweickert.”

The said sureties duly justified, and the clerk of the court approved said undertaking.

Thereafter, the following motion was filed by the attorney for the defendant in error:

“In Supreme Court, Wyoming Territory. John Geer, plaintiff in error, v. Thomas D. Murrin, defendant in error: Now comes Thomas J. Street, attorney for the above-named defendant in error, and moves the court now here to affirm the judgment of the court below, as well against the said plaintiff in error, John Geer, as against Stephen Bin and Fred. Schweickert, the sureties in the undertaking for the proceedings in error herein filed and given, for the whole amount of the said judgment and costs, with the accruing costs, together with damages in the amount thereof of twelve per centum, as prescribed by the statute in such case provided, for these reasons, to wit: 1. Because the said plaintiff in error neither excepted to the decision and judgment of the court below, nor filed and made, nor caused

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to be filed and made, any bill or bills of exception, showing wherein the said plaintiff in error objected to the ruling of the court below; and, 2. Because it appears from the whole record and transcript of the proceedings of the court below herein filed on the part of the defendant in error, that the said proceedings in error were wholly taken for delay. Thos. J. Street, attorney for defendant in error."

W. W. Corlett, for plaintiff in error.

Thomas J. Street, for defendants in error.

Motion granted.

HORTON AND REEL v. PEACOCK.

PROCEEDINGS IN ERROR—PRACTICE.—In commencing proceedings in error the provisions of the statutes must be strictly complied with. Thus, where the statutes require absolutely that a bond or undertaking for suits, etc., be given by plaintiff in error, and he fails so to do, his proceedings will, on motion, be dismissed.

ERROR to Laramie County, First Judicial District Court.

Judgment was entered in the district court in favor of Amos Peacock, then plaintiff, now defendant in error, against Horton and Reel, now plaintiffs in error, and then defendants. In their proceedings in error, the said plaintiff failed to execute and file the bond required by statute, whereupon the attorneys for the defendant in error moved to dismiss the proceedings in error, and to affirm the judgment of the district court for the reason stated.

Thomas J. Street, for plaintiff in error.

D. McLaughlin, W. R. Steele & E. P. Johnson, for defendants in error.

Motion granted.

Statement of Facts.

SCOTT, *alias* JONES, v. THE UNITED STATES.

JURISDICTION OF THE UNITED STATES.—Under the provisions of the organic act of the territory of Wyoming, the United States has exclusive jurisdiction over the forts and military reservations thereof. The federal judges of the territory, sitting with the powers of circuit and district judges of the United States, are empowered to try all offenses committed on such reservations, against the laws of the United States.

ERROR to the Second District Court.

Richard Scott, *alias* Nathan Jones, was indicted at a term of the district court, sitting as a circuit court of the United States, held at Rawlins, Carbon county, Wyoming, under the laws of the United States, for the crime of murder.

He was tried, found guilty, and sentenced to suffer the extreme penalty of the law. Upon the trial it was proven that the offense was committed upon the United States military reservation of Fort Fred Steele, in said county and territory.

Counsel for prisoner, on motion for new trial, urged that the same should be granted because:

I. The United States in this territory have not exclusive jurisdiction over the military reservations therein.

II. That the prisoner should have been tried on the territorial side of the court, and not upon that of the United States; that is, he should have been tried for a crime against the laws of the territory, and prosecuted by the county attorney with a jury impaneled under the territorial laws, instead of being tried for an offense against the general government, prosecuted by the United States district attorney, and by a jury impaneled under the laws of the United States.

III. Because upon the trial of this cause it did not appear that the defendant committed any crime against the laws of the United States, as alleged in the indictment in the cause.

IV. Because it did not appear, upon the trial of this cause, that the offense charged in the indictment herein against the defendant was committed in any fort, arsenal, dock

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yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States.

V. Because the said verdict is not supported by sufficient evidence, and is contrary to law.

VI. Because the court erred in instructing the jury as to the law applicable to the case, to which instructions the said defendant then and there excepted.

The motion for a new trial was overruled, and the cause brought by writ of error to the supreme court.

M. C. Brown & W. W. Corlett, for plaintiff in error.

J. W. Carey, *United States District Attorney*, for defendant in error.

Decision of the court below affirmed.

IVINSON v. THE TERRITORY OF WYOMING.

ERROR to Laramie County, First District Court.

Proceedings in error dismissed for the same reasons given in the preceding cases of *Murrin v. Ullman* and *Geer v. Murrin*.

Corlett & Brown, for plaintiff in error.

Downey & Carey, for defendant in error.

ROGERS v. LOWRY & UPTON.

ERROR to First District Court, Laramie County.

J. W. Cook & W. W. Corlett, for plaintiff in error.

Thomas J. Street, for defendant in error.

The same decision was rendered by the court, and for the same reasons, as stated in the preceding cases of *Murrin v. Ullman* and *Geer v. Murrin*.

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ROGERS v. COLLINS.

ERROR to First District Court, Laramie County.

J. W. Cook and W. W. Corlett, for plaintiff in error.

Thomas J. Street and M. C. Brown, for defendant in error.

Proceedings in error dismissed, and judgment of the court below affirmed, for the reasons given in the two causes last hereinbefore cited.

SEARS ET AL. v. THE BOARD OF COUNTY COMMISSIONERS OF ALBANY COUNTY.

ERROR to First District Court, Albany County.

M. C. Brown, for plaintiffs in error.

S. W. Downey and J. M. Carey, for defendant in error.

Same decision as in the next preceding case, and judgment affirmed.

WILSON v. O'BRIEN.

MOTION FOR NEW TRIAL.—It is now a well-settled doctrine on that subject that before a party can bring a case into the supreme court from a district court, he must first have made his motion for a new trial in that court in writing and assigned his reasons therefor.

IDEM.—A motion for a new trial must be interposed within three days after the verdict is rendered.

IDEM.—The district court must first have the opportunity to review the errors complained of, which must be assigned in such motion before the party complaining can bring the case to the supreme court for review.

ERROR to First District Court for Laramie County.

Judgment was rendered in this action in the district court for the plaintiff, N. J. O'Brien, and against the defendant Wilson. Said defendant then instituted proceedings in

Opinion of the Court—Kingman, J.

error in the supreme court without having either made a motion in the court below for a new trial, or having a bill of exceptions allowed and signed by the judge of that court. Whereupon the counsel for the defendant in error moved to dismiss the proceedings in the supreme court for the reasons above stated.

W. W. Corlett and E. P. Johnson, for plaintiff in error.

I. W. Cook and W. R. Steele, for defendant in error.

By the Court, KINGMAN, J. This cause comes into this court by appeal. It appears from the record that the case was tried by a jury, Howe, C. J., presiding, and a verdict rendered for the plaintiff. No motion for a new trial was interposed, and three days after the day on which the verdict was rendered judgment was duly rendered by the court upon the verdict for the plaintiff. The defendant assigns as reasons for the reversal of the judgment, the rulings of the district court in rejecting evidence offered by him to dispute and contradict the receipt ruled on, and in admitting evidence offered by the plaintiffs, etc.

We have already held in another case at this term, and such seems to be the well-settled doctrine on that subject, that before a party can bring a case into this court from the district court, he must first have made his motion in that court in writing and assigned his reasons therefor, and under our statute this motion must be interposed within three days after the verdict is rendered. Unless this is done, and the motion overruled by the district court, this court will not take cognizance of the case to review the alleged errors of the district court. That court must first have the opportunity to review the errors complained of, which must be assigned in the motion for a new trial before the party complaining can bring the case here for review. And when this is done, this court will only consider such alleged errors of the district court as are set forth in the motion for a new trial: 1 Nebraska, 398, and numerous cases there cited.

Opinion of the Court—Kingman, J.

We have, however, in this case looked carefully into the record and considered the errors alleged, and are fully satisfied that the rulings of the district court were correct, and that there is no error in the record; that the judgment of the district court, on the merits of the case, was right, and that the judgment ought to be affirmed: Drake on Attachments, 381, and cases there cited.

Judgment affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
JULY TERM, 1872.

GREAT WESTERN INSURANCE COMPANY *v.*
PIERCE.

COUNTER-CLAIM.—A counter-claim set up by the defendants in an action can only be maintained where it exists in favor of all the defendants against the plaintiffs, and each and every of them.

IDEM.—“Where a note is on its face joint or joint and several, it is conceived that evidence to show that one maker is surety for the other is inadmissible at law if the question arises between the creditor and the surety; but evidence to that effect has been received when the question arises between the principal debtor and the sureties.”

IDEM.—“As between the makers of a promissory note and the holders, all are alike liable, all are principals; but as between themselves, their rights depend upon other questions.”

IDEM.—A counter-claim cannot be maintained by one alone of several defendants, who are all joint and several makers of a promissory note, against the holder and payee, although such defendant offer to prove that he alone is the principal, and the other defendants simply sureties.

VERDICT—FORM OF.—Where a verdict is returned in writing by a jury, it should at least show clearly upon its face precisely what the jury intended to find. It should state for which of the parties to the action the jury finds, and also against which one, where there are more than one of either plaintiffs or defendants.

IDEM.—A verdict in the following form held to be insufficient: “We, the jury, find a verdict for H. A. Pierce for the sum of one thousand one hundred and fifty-eight dollars and five cents. A. P. Post, Foreman.”

Argument for Defendants.

ERROR to the First District Court for Laramie County.

A full statement of this case is contained in the following opinion of the court.

This was an action brought by the *Great Western Insurance Co. v. H. A. Pierce and L. Murrin & Co.*, on a certain promissory note, in the following form :

“\$538.97. Cheyenne, Feb. 16, 1871. Sixty days after date we, or either of us, promise to pay Great Western Insurance Company of Chicago, Ills., or order, five hundred and thirty-eight $\frac{97}{100}$ dollars, value received, with ten per cent. interest from this date, payable at the banking house of Posey S. Wilson, at Cheyenne, W. T. H. A. Pierce and L. Murrin & Co.”

The above note not having been paid at maturity, suit was brought against the makers thereof to the July term of the said court, 1871.

D. McLaughlin, for plaintiff, filed his petition setting out as the cause of action the foregoing note.

Messrs. Johnson & Steel, for defendants, filed an answer to plaintiff's petition, in which they admit the execution of the note, but allege that L. Murrin & Co. signed the said note as sureties; and that H. A. Pierce alone, defendant, was the principal. They deny that they are indebted to the plaintiff in the amount of the note, or in any other amount. They further allege that the plaintiff is indebted to defendant Pierce for services rendered and other matters, as set forth in a schedule thereto attached and made a part of defendant's answer in the sum of eleven hundred and fifty-eight dollars and five cents. To this answer the plaintiff by his counsel filed a general demurrer, which after argument was overruled. Plaintiff then filed an application for continuance upon the ground of absent witnesses, which were material on account of the counter-claim set up by defendants. This application was refused.

Argument for Defendants.

Plaintiff then filed a replication to defendants' counter-claim, denying each and every material allegation of the same, and denies that plaintiff owes defendant said sum of ten hundred seventy-five dollars and five cents, or any other sum whatever, and demands judgment as prayed for in its complaint. The case being ordered to trial by the court, Chief Justice J. H. Howe presiding, upon the pleadings as they then stood.

The plaintiff, by its attorney, moved the court to dismiss the cause as to plaintiff's claim, and it is so ordered by the court to be dismissed, and the privilege given to defendants to prosecute their counter-claim. A jury was called and sworn, when defendants submitted the schedule of items making up the amount, viz., one thousand and seventy-five dollars and five cents claimed by H. A. Pierce, one of the defendants, against the plaintiff. The jury retired to their room, and returned a verdict in the following form:

"We, the jury, find a verdict for H. A. Pierce for the sum of one thousand one hundred and fifty-eight dollars and five cents. (\$1158.05.) A. B. Post, foreman."

The plaintiff, by its attorney, moved the court to set aside the verdict of the jury in the above entitled cause, for the following reasons: 1. Because the court erred in overruling the demurrer of plaintiff to defendants' answer: 2. Because the verdict is against law; that it is irregular and uncertain, and is not given in favor of or against either the plaintiff or defendants.

The plaintiff, by its attorney, moved the court also to grant a new trial, both of which motions were refused.

In the answer of defendant to plaintiffs' petition they set out, although the note upon which the suit is brought is in form a joint and several note, that it was understood by all the parties to the transaction that H. A. Pierce was the real maker of the note, and that L. Murrin & Co. signed it as sureties, and hence, H. A. Pierce had a right to present his schedule as a counter-claim, a set-off to the note, and if that is so, then the court below did right in overrul-

ing the plaintiff's demurrer to defendants' answer; on the other hand, however, if the note in question was really as its face represents it to be, a joint and several note, that then no matter whether the items in the schedule presented by H. A. Pierce were correct or not, that they could not be set up as a counter-claim in a suit brought on the note, from the fact that a counter-claim must partake of the nature of the action against which it is set up, and moreover must be of such a character that the defendant who raised it could maintain an action on it against the plaintiff. And again, it was claimed by the plaintiff that the only evidence by which it can be shown that one or more of the signers to a joint and several note signed it as sureties, must be made to appear by the instrument itself. In support of these positions various authorities were cited, and the defendants, in support of their view of the case, referred us to several authorities, none of which, however, satisfy us of the correctness of either of their positions.

D. McLaughlin, for plaintiff in error.

E. P. Johnson and Thomas J. Street, for defendants in error.

By the Court, FISHER, C. J. We are of opinion that the court below erred in overruling the plaintiff's demurrer to defendants' answer, for the following reasons: This action was brought by plaintiff against defendants H. A. Pierce and L. Murrin & Co., who were the makers of a joint and several note, and while Pierce may have been the principal and Murrin & Co. sureties, this fact, if it be a fact, might be shown in a suit brought by Pierce against L. Murrin & Co. for contribution, had Pierce paid the note at maturity, or at any other time; yet we are very clearly of the opinion that it would not be plead in an action brought by the payee against the makers of the note. We are sustained fully in this opinion by referring to Byles on Bills, 68, where the auditor uses this language:

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“Where a note is on its face joint, or joint and several, it is conceived that evidence to show that one maker is surety for the other is inadmissible at law, if the question arise between the creditor and the surety; but evidence to that effect has been received where the question arises between the principal debtor and the sureties. The same doctrine is maintained in *Robinson v. Lyle*, 10 Barb. 512; the syllabus of that case is as follows: As between the maker of a promissory note and the holder, all are alike liable, all are principals, but as between themselves, their rights depend upon other questions which are the proper subjects of parol evidence.” This doctrine prevails to such an extent that we are led to wonder that it should be questioned in any case. If then the signers of the notes in question are all to be regarded as makers, the next questions that arise are, can a counter-claim be set up? and, if so, by whom can it be interposed, and what must be its character? If all the signers to the note are to be considered as the makers of the note, then a counter-claim or set-off must be such a claim as that the defendants in the action could maintain an action against the plaintiff; because the rule of law is, that the counter-claim must be something which is due to the defendant, and which the plaintiff is liable to be sued upon by defendant; and, moreover, it must be a claim arising out of or partaking of the nature of the plaintiff's cause of action. Now, if in this case the plaintiff's cause of action arises upon the note of defendants, it being a joint and several note, and if the law will not permit parol evidence to be given to contradict or vary the face of the note, then the counter-claim or set-off must be the same debt due by the plaintiff to the defendant, and not to one of the defendants only.

This term counter-claim, according to Nash, is a sort of a novel term interpolated into our civil jurisprudence: it is not to be found either in our law or general dictionaries; it is a kind of mongrel or compound word; the term “counter” is defined to be contrary to, contrary way, opposition

Opinion of the Court—Fisher, C. J.

to, etc.; the word claim is defined to be the demand of anything that is in possession of another, to demand, to require, etc., but in its legal use it has been understood in a somewhat enlarged sense, and that is the right to demand of another; thus we say we have a claim against another when in fact we only mean that we have a right to make such claim or demand. If, then, the defendant set up a counter-claim it must be such an one as they would have had a right to sue upon.

Now, in this case had the defendants, that is, we mean the names of the persons in the record as defendants, such a claim as they could have maintained an action against the plaintiff in this suit. Clearly they had not. If they had not then, how could they set up the claim of one of the defendants against that of the plaintiff in this action? If all the defendants had been interested in the account set out in the schedule introduced by one of the defendants, they might have plead it by way of set-off; but for the court to allow one of the defendants to introduce a book account of his own as a counter-claim to defeat an action upon a joint and several promissory note given by all the defendants is an anomaly in jurisprudence.

2. The second point to be considered is the form of the verdict, and if there was nothing in what has already been said, there is enough in this not only to justify us in setting aside the entire proceedings in this case, but to excite our wonder how any court should have hesitated to grant a new trial. Revelation tells us of a time when "the earth was without form and void, and darkness was upon the face of the deep." This verdict is in about the same condition. It is in fact nothing. It is neither for plaintiff nor defendant.

The Great Western Insurance Company, plaintiff, bring a suit against H. A. Pierce and L. Murrin & Co., defendants, and the jury find for H. A. Pierce the sum of eleven hundred and fifty-eight dollars and five cents. How do we know whether it is for the same H. A. Pierce, as one of the defendants, or not? It does not even say that it is for H.A.

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Pierce, defendant; and if it did, it would not be in favor of the defendants in this action.

A verdict in a case of this character should be in such form that if the question were asked by the clerk, for whom they had found, the jury should be able to answer either for plaintiff or defendant; but this one does not inform us whether the verdict is for a party to the record or not. It is true that the name of H. A. Pierce is in the record, but is not there as defendant in this action. It is presumed that the jury referred to the same Pierce who is one of the defendants, but there is no certainty about it. Now, without elaborating this case any further in the consideration of either of the points, it is sufficient to say one would be fatal to the verdict.

The whole proceedings are therefore set aside.

WILSON v. ROGERS.

NATIONAL BANKS—POWERS OF AGENTS.—Money paid to the cashier of a bank for the use of and benefit of the bank, is payment to the bank itself. If such cashier misapply the funds so received, the bank, as his principal, can maintain an action against him, but not the person paying the money.

IDEM.—If the latter suffer injury by reason of such misapplication, his remedy lies against the bank and not against its officer or servant.

IDEM.—An agent receiving money from a third person for his principal, if he acted within the scope of his authority, and has the right to receive such payment, is not responsible to the third person; payment to the agent is payment to the principal, who is responsible for the default of the agent.

ERROR to the First District Court, for Laramie County.

The following is the statement of the case, written by the judge who delivered the opinion of the court:

An appeal from the district court, first judicial district, March term, 1872. This was an action by the plaintiff below to recover damages of the defendant in the sum of four thousand dollars. The amended petition alleges that the

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plaintiff on the twenty-first day of February, 1871, delivered to the defendant the sum of five thousand dollars, in consideration of which the defendant promised the plaintiff to pay the said five thousand dollars into the First National Bank of Cheyenne, a bank incorporated under the laws of the United States, in payment of fifty per cent. of one hundred shares of the capital stock of said banking association, for which the said plaintiff had theretofore subscribed. That the defendant in violation of his undertaking did not pay the said sum, nor any part thereof, to said bank in payment of fifty per cent. of one hundred shares of capital stock for which plaintiff had subscribed, to the damage of the plaintiff in the sum of four thousand dollars. The defendant's answer was a general denial.

On the issue thus made up the case was tried by a jury in the court below, and verdict rendered for defendant. Motion was made by plaintiff to set aside verdict, and grant a new trial which was overruled by the court, to which ruling the plaintiff excepted. The reasons alleged for a new trial are the same as the first two assignments of error in this court, which assignments of error by appellant are as follows, to wit: 1. That the court below erred in rejecting the evidence offered to be given to the jury to restrain the issues upon his part; 2. That the court below erred in its instructions as given to the jury upon the trial of the cause; 3. That the court erred in overruling the appellant's motion for a new trial.

The only instructions which appear from the record to have been given to the jury in this case, are as follows: "That the verdict under the evidence, as given to them, must be for the defendant, as there has been no liability shown to rest on him."

These instructions were excepted to by plaintiff's counsel in the court below. The only witness examined in the district court was Posey S. Wilson, the plaintiff, who testified substantially as follows: "That he was one of the incorporators and directors of the First National Bank of

Statement of Facts.

Cheyenne, which was organized on the tenth day of January, 1871; that he, the plaintiff, in December, 1870, subscribed for ten thousand (10,000) dollars of the capital stock of said bank, and that the defendant, Rogers, subscribed for twenty-five thousand (25,000) dollars of the capital stock of said bank; and that said Rogers, on the tenth day of January, 1871, was elected cashier and one of the directors of said bank, at which time the organization of the bank was completed, and the first assessment of fifty per cent. on the capital stock made. That he, Wilson, paid his assessment of five thousand dollars by a check drawn on himself in favor of the First National Bank of Cheyenne, which check he, Wilson, paid to Rogers, the defendant, as cashier of said National Bank. That he, Wilson, received a receipt for said amount of money from H. J. Rogers, cashier of said bank, per Hoyt, assistant cashier, who was also clerk of Rogers & Co. Hoyt was elected assistant cashier at the same meeting in which Rogers was elected cashier, and all his acts were ratified by the board of directors."

The check and receipt referred to are as follows :

"Cheyenne, W. T., Jan. 16, 1871. Posey S. Wilson, banker, pay to First National Bank, Cheyenne, five thousand dollars (5,000). P. S. Wilson, indorsed as follows: H. J. Rogers, cashier, per Wild."

"No. 14. Cheyenne, Wyoming Territory, January 16, 1871. Received of P. S. Wilson five thousand dollars, to apply on capital stock First National Bank, being fifty per cent. of one hundred shares. \$5000. H. J. Rogers, Cash. Hoyt."

The plaintiff offered to show that defendant received the money, being the said five thousand dollars, from plaintiff, for the purpose of paying it into the First National Bank in payment of the first assessment on the stock subscribed for by the plaintiff, and that defendant wholly failed to appropriate the money aforesaid to that purpose, but instead thereof,

Argument for Appellant.

directed and appropriated it to the payment of his own debts and the debts of the banking firm of Rogers & Co., of which he was a member; and thereby and by reason thereof the plaintiff was damaged in the sum claimed, to wit., the sum of four thousand dollars, and for that purpose witness was asked the following questions, to each of which the defendant objected, which objections were sustained by the court and the evidence rejected. The plaintiff in each case excepting to the rulings of the court:

First question.—State whether or not defendant paid the First National Bank of Cheyenne, as was intended, in payment of the assessment due on your subscription to the capital stock?

Second question.—At the time you paid this five thousand dollars to Mr. Rogers to be applied to the payment of your subscription to the stock of the bank, did you have any knowledge this money was to be applied to any other purpose than the use for which it was paid?

Third question.—Did you sustain any damage in consequence of the failure of defendant to pay the five thousand dollars into the First National Bank of Cheyenne; and if so, in what amount?

Corlett and Johnson, for appellant, contended:

I. That the evidence offered on the part of appellant and rejected by the court, tended directly and distinctly to prove and maintain on his part the issues as made up by the pleadings in the cause: citing 1 Greenl. on Ev. secs. 51 to 55.

II. An agent is personally liable if he transcends his agency or departs from its provisions, or if he conducts himself so as to render his principal inaccessible or irresponsible, or if he acts in bad faith: 1 Parsons on Con. 64 to 74, and the cases there cited; 11 Wend. *Teter v. Heath*, 479; Story on Agency, 335 to 408; 2 Kent, 630.

III. The appellee's personal responsibility is fixed by the fifty-third section of the national banking act, to which reference is made: 13 Stat. at Large, 116.

Opinion of the Court—Carey, J.

W. R. Steele, for appellee, urged that an agent receiving money from a third person for his principal, if he acted within the scope of his authority and has the right to receive such payment, is not responsible to the third person; payment to the agent is payment to the principal, who is responsible for the default of the agent. If the agent fail to pay over such money, he is responsible to his principal to whom he owes the duty and to no one else, and cited: 1 *Parsons on Con.* 79 (note "E"); 1 *Bouv. Agency*, 102; 2 *Greenl. sec.* 68; 2 *Comst.* 2 N. Y. 126; 7 *Ohio S.* 231; 12 *Barb.* 456; 10 *Id.* 663; 2 *Denio*, 115; *Paley's Agency*, 388; *Story on Agency*, 216 to 310; *Abbott's Corp.* 550; 8 *Wall.* 498.

By the Court, CAREY, J. The first error assigned in this case is that the district court erred in rejecting the evidence offered to the jury to sustain the issues on the plaintiff's part. Though it does not appear in the record upon what grounds the objections were made to said evidence by the defendant, we are of the opinion that the court was right in refusing to allow the questions to be answered. In the asking of each of the questions it is assumed it had been proved that H. J. Rogers, the defendant, had received money from the plaintiff, to be paid over to the First National Bank of Cheyenne, as payment of an assessment on a certain amount of capital stock of the said bank, for which plaintiff had theretofore subscribed.

The testimony of Mr. Wilson, and the check and receipt offered in evidence, show that Mr. Wilson paid the installment on the capital stock of said bank, not to H. J. Rogers, as his agent or bailee, but to the said bank, as directly as money can be paid to any corporation. The check given was drawn in favor of said bank, and was collected by said bank in the usual manner of making such collections, and is indorsed, not by H. J. Rogers as a principal, but by H. J. Rogers as cashier of said bank, per Wild. Nowhere in the evidence does it appear that Mr. Wilson made Mr.

Opinion of the Court—Carey, J.

Rogers his agent or bailee, but in his payment of assessment on the capital stock of said bank that he transacted his business directly with said bank in payment of said money to an officer of the bank. The bank, by its officers, had therefore made an assessment on its capital stock, and Mr. Wilson, being a stockholder, paid the amount due on his assessment to said bank, and if the latter, through any of its officers, failed to appropriate the money to the purpose for which it was intended, and Wilson was damaged, the remedy is against the bank. It is true, as contended by counsel for appellant, that if an agent transcends his agency, or departs from its provisions, or conducts himself so as to render his principal inaccessible or irresponsible, or if he acts in bad faith, he makes himself personally liable: Parsons on Cont. 64.

We cannot see how this principle can apply in this case. The petition upon which this cause was tried does not allege that the defendant was the agent of any one, but that he as principal for consideration promised and undertook to do what is therein alleged. While the proof offered shows that when he received said sum of five thousand dollars, he received it as cashier of the First National Bank of Cheyenne. It is a well-established principle that the proofs must correspond with the allegations in the petition. In this case they are wholly at random with its allegations. Again, it is contended that the appellee's personal responsibility is fixed by the fifty-third section of the national banking act, thirteenth volume United States statutes, page 116. This section provides that if the directors of any association (national banks) shall knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of the act, * * every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person shall have sustained in consequence of such violation.

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We fail to see how this provision of the banking laws of the United States can be made applicable in this case. It is not alleged in the petition upon which the case was tried: 1. That the directors of the First National Bank of Cheyenne violated or permitted to be violated any of the provisions of the banking law; or, 2. That H. J. Rogers, the appellee, was a director in said bank, or that he participated or assented to the violation of any of the provisions of the said law, all of which requisites would be necessary to sustain an action under the section named.

We are of the opinion that the district court, under the evidence, was correct in its instructions to the jury, and very properly overruled the motion to set aside the verdict of the jury and grant a new trial.

Judgment affirmed.

HORTON v. PEACOCK.

PRACTICE—APPEAL, WRIT OF ERROR.—Where a code of civil procedure allows a party to carry proceedings for review to the supreme court, either by appeal or writ of error, he must decide upon which course he will rely. After having attempted to reach the supreme court by appeal, and having failed therein by reason of not perfecting the same in filing the undertaking required by statute, it is then too late for him to resort to another remedy, and to attempt to have the proceedings of the district court reviewed by means of a writ of error or petition in error.

ERROR to the District Court for Laramie County.

This was an action brought in the district court of Laramie county to the March term, A. D. 1870, at which term a verdict was returned in favor of the plaintiff against H. B. Horton for the sum of three thousand dollars. The defendant reserved certain exceptions and gave notice of an appeal to this court. A transcript of the proceedings was certified to this court in due form, the defendant however having failed to enter into an undertaking as required by section 723 of the code of civil procedure of this territory. At the

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term of this court for 1871, the counsel for the appellee moved the court to strike off the appeal, for the reason that no such undertaking had been filed; whereupon the court granted the said motion, and not only struck off the appeal but directed a procedendo to the court below directing proceedings to cover the amount of the judgment, with interest and costs. Application was then made by the appellant for leave to file a petition in error, which after argument was granted, with the understanding not that this action was to be final, but to be a question for consideration at the next term of the court. The case coming on for argument at the regular term of the court, the counsel for appellee moved to strike off the appellant's assignments of error, and after argument by counsel the majority of the court sustained the motion.

Thomas J. Street, for plaintiff in error, cited *Laws of Wyoming*, title 24, *Code of Civ. Pro.*; 2 *Am. Rep.* 718; 3 *Id.* 339; 12 *Wheat.* 477; 13 *Allen*, 123, 128; 17 *Ohio*, 190; 97 *Mass.* 452, 458; 53 *Penn.* 177; 7 *Pet.* 453, 482, 551; 7 *Wall.* 321; 5 *Gray*, 482; 57 *Barb.* 491.

E. P. Johnson and D. McLaughlin, for defendant in error, maintained:

I. That the cause having been taken to the supreme court on appeal, it has been passed upon in that court, the dismissal of the appeal being a technical affirmance of the judgment of the court below; it cannot again be heard on the same issues involved. There are two ways to get into the supreme court, and this plaintiff in error having elected to go by appeal, cannot now be permitted to come up the other way: 1 *Green*. 86; *Hill. on New Trials*, 614, 615; 24 *Cal.* 52; 15 *Cal.* 324; 1 *Ill. Digest*, 25, sec. 26; *Id.* 26, sec. 47; *Hill. on New Trials*, 590. And that in a case reported in 16 *Cal.* 207, the question is determined in the following language: "Dismissal of an appeal in the supreme court for want of prosecution operates as an affirmance of the judgment below, within the statute relative to undertakings

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on appeal, unless the order of dismissal be vacated during the term.

II. The record in this case shows that only a portion of either the evidence or instructions are given. Whereas, to enable the court to pass intelligently upon the merits of the case, all the instructions show affirmatively it is so: 3 Green, 246; 4 Id. 125, 468; Nash's Ohio Dig. 56; 1 Neb. 398; 43 Ill. 124; 46 Id. 112; 2 Barclay's Dig. 395; 2 Nev. 265; 1 Ill. Dig. 247, sec. 50; 2 Id. 196, secs. 6, 10, 22, 23; Ohio Dig. 121, sec. 13; Id. 122, sec. 44.

III. The foregoing proposition is a necessity, were it not so well sustained by authorities, from the fact that all presumptions are in favor of a judgment of courts of general jurisdiction, and he who would set them aside, must affirmatively show not only that there was error, but that he is prejudiced by reason of the occurrence; and the court for correction of errors, must have all the facts of the case before it, to enable it to see whether the error complained of is prejudicial, and unless the moving party does make a full showing, the presumptions will be against him: Nash's Ohio Pl. & Pr. 689; 6 Iowa, 553; 1 Green. 74, 157, 165; 1 Iowa, 116, 121; 1 Ill. Dig. 183, sec. 15; 8 Watts & Sergt. 391; 5 Id. 188; 5 Kan. 311, 425; 4 Green. 84.

By the Court, FISHER, C. J. (KINGMAN, Justice, dissenting.) 1. The appellant having availed himself of his remedy by appeal, and having neglected to perfect his appeal by filing his undertaking, as required by the statute, it is too late for him to fall back, and avail himself of the advantages of his petition in error. It is true that the appellant was deprived of his opportunity to review the proceedings in the court below, but that was owing altogether to his own want of diligence. It was optional with the defendant to seek his remedy either by an appeal or by petition in error. He chose the former remedy, which he failed to perfect, and having so failed, it is too late now to abandon the appeal, and seek his remedy by a petition in error. The judg-

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ment was entered in the district court in April, 1871. The statute allows thirty days in which to perfect his appeal, by filing an undertaking as provided for, and if in that time he discovered that he could not enter the undertaking he might have prepared and presented his petition in error, and in this may have placed himself in such a position as that he could secure his proper standing in court; but we cannot conceive the right to pursue one remedy until he failed in it, and then resort to another. This was the doctrine of the supreme court of Iowa in the case of *Davis v. Alexander*, 1 G. Green, 86. The court in that case held that "the case having been once determined in the supreme court it cannot be brought up again by writ of error." By a further examination of the case, we find:

2. That the former writ of error was dismissed for want of the notice required by the law; that the writ of error had been sued out. The court, for the reason that the notice had not been given dismissed the case, and awarded a procedendo to the court below to carry their judgment into effect; this, too, without going into an examination of the errors complained of in the petition in error, so that, although the case in the supreme court of Iowa differs from this case in the fact that there had been a former writ of error sued out, while in this case an appeal was the remedy sought, yet in neither case did the reviewing court examine the case on its merits.

In the case of *Brooks v. The Town of Jacksonville*, 1 Seam. 568, the court say: "Where the appeal is dismissed the court will not permit the transcript of the record to be withdrawn for the purpose of bringing a writ of error." Again, the courts have held that the dismissal of an appeal by the supreme courts amounts to an affirmance of the judgment of the court below. This was held by the supreme court of Illinois in the case of *McConnell v. Swails*; also in *Sutherland v. Phelps*, where the court held (2 Seam. 571), that "the dismissal of an appeal a *certiorari* is equivalent to a regular technical affirmance of the judgment of the court

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below, so as to entitle a party to claim a forfeiture of the bond, and have his action therefor."

In the case at bar there was no bond, consequently there could not be judgment taken against the sureties on their undertaking, but we apprehend that the principle will apply to the appellant in this case, and permit the appellee to have his execution. This same principle is recognized as the settled policy of the law in *Hilliard on New Trials*, p. 596, 597, 614, 615, the author citing: *McManus v. Humes*, 6 Iowa, 159; *Brill v. Meek*, 20 Miss. 358; *Hobson v. Doe*, 4 Blackf. 487.

We, therefore, are clearly of the opinion that the defendant in this case, having attempted to avail himself of the benefit of an appeal, and having neglected to enter into the undertaking, as required by the statute, and having had his appeal stricken off by this court, the judgment in the court below became absolute even without the *procedendo*; that it is too late now for him to apply to us by petition in error.

The motion is granted and the case dismissed.

DONNELLAN, TREASURER OF WYOMING TERRITORY, v.
NICHOLLS ET AL., COMMISSIONERS OF LARAMIE COUNTY.

MANDAMUS—CONFLICT OF LAWS.—Where statutes, otherwise of equal validity, conflict, the greater force should be given to the one tending to the best interests of the commonwealth, and to the enforcement of the laws.

IDEM.—Where one law provides that no moneys shall be paid out of the territorial treasury, unless especially appropriated by the legislature, and another law provides for the proper custody and maintenance of convicted criminals, but no appropriation having been made for the purpose, a writ of mandamus will issue to compel the territorial auditor to audit the proper account for the same, and to compel the treasurer of the territory either to pay such account when audited, or to certify that there are no funds in the treasury wherewith to pay the same.

ERROR to the First Judicial District Court for Laramie County.

On the third day of April, 1872. the above-named defend-

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ants in error filed in the district court the following petition, duly verified, for an order of mandamus against the above-named plaintiff in error:

“To the honorable district court within and for said Laramie county, in said judicial district: Your petitioners respectfully represent and state to the court that they constitute the board of county commissioners for said Laramie county, and as such have performed the duties pertaining to that office for nearly two years. That as such county commissioners, upon proper application having been made to them, and it having been shown to them that the sum of four hundred and eighty dollars was required to transport prisoners who had been convicted and sentenced at the adjourned November term, A. D. 1871, of the district court of said Laramie county, they made the formal application required under the law, and thereby requested the governor to approve the said application and order a warrant drawn on the treasury for said sum; and Herman Glafeke, the then acting-governor, wrote his approval thereon, and requested the auditor of Wyoming territory to draw the warrant, which the auditor refused to do. Whereupon your petitioners, at a term of the district court of the said first judicial district, held in the county of Albany, brought their writ of mandamus to compel the said auditor to draw a warrant for the amount allowed by the governor as hereinbefore stated. That thereupon and during the said term of court, and prior to the making of this petition, the said court, being fully advised in the premises, ordered and decreed that the said auditor should make out the said warrant for the said sum of four hundred and eighty dollars, and that thereupon your petitioners procured the said warrant and thereafter presented the same to J. W. Donnellan for payment; but said J. W. Donnellan refused to recognize the said warrant so issued as aforesaid as a legal and binding obligation on the territory, and refused to pay the same or to indorse on the warrant, as the reason for such refusal, that there were no

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funds in the treasury. And your petitioners further state that they are entirely remediless in the premises, unless it be afforded by the interposition of the court, and they therefore pray that a writ of mandamus against the said J. W. Donnellan, treasurer of the territory of Wyoming, be granted, and that he be commanded to pay the said warrant so issued as aforesaid, or indorse upon the same the date and time of its presentment and the reason for non-payment, and that such other orders shall be made in the premises as shall seem proper. J. H. Nicholls, Chairman, per J. W. Cook, his attorney."

Whereupon an alternative writ of mandamus was issued by said district court against the said J. W. Donnellan, treasurer as aforesaid, commanding him either to pay said warrant forthwith out of the moneys in the territorial treasury, or to show cause, on a day certain, why he had not so done.

The plaintiff in error then filed the following:

"Answer to alternative writ. (Title of cause.) And the said J. W. Donnellan now comes and for answer to the alternative writ of mandamus, heretofore issued in this cause, says that the relator ought not to have his peremptory writ of mandamus, because he saith that, by the provisions of the twenty-third chapter of the laws of Wyoming Territory, entitled an act to organize and establish the territorial treasury department, approved December 2, 1869, he is prohibited from doing as is commanded by the alternative writ, and further he saith not. J. W. Donnellan."

After arguments of counsel the following order was then entered in this cause:

"March term, 1872. Wednesday, April 3, 1872. *The County Commissioners v. J. W. Donnellan.* This cause, coming on to be heard this day, the defendant, by his attorney, filed his answer, and after argument of counsel, it is ordered by the court that peremptory mandamus shall issue, to which counsel for defendant excepts. J. W. Fisher, Judge First Judicial District."

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The plaintiff in error then filed in the supreme court the following:

“Petition in error of defendant, J. W. Donellan. And now by leave of a judge of the supreme court first had and obtained, J. W. Donellan for cause of action complains: That heretofore, to wit, on the third day of April, 1872, at a term of the district court in and for the county of Laramie, the said J. H. Nicholls, M. E. Post and Timothy Dyer recovered a judgment against said defendant by the consideration of said court in a certain case then pending in said court, wherein the said J. H. Nicholls, M. E. Post and Timothy Dyer were plaintiffs, and J. W. Donellan, defendant, a copy of the records and proceedings in which case duly certified is hereto attached, marked “A,” and made part of this petition, and the said J. W. Donellan avers that there is error in said record and proceedings in this, to wit: That the court erred in granting a peremptory mandamus to compel defendant to indorse a certain territorial warrant, as in said petition was prayed for. The said J. W. Donellan therefore prays that the said judgment may be reversed and said complainant restored to all things he has lost by reason thereof. E. P. Johnson, attorney for complainant.”

E. P. Johnson, for plaintiff in error.

I. W. Cook, for defendants in error.

By the Court, FISHER, C. J. This was an action on a petition for a peremptory mandamus to compel the respondent in the court below, who was the treasurer of the territory of Wyoming, to indorse a warrant drawn by J. H. Hayford, auditor of the territory, in favor of the petitioners, who were the commissioners of Laramie county. The money to be realized on the warrant was for the purpose of indemnifying the said county for the expenses incurred in taking prisoners to the house of correction at Detroit, in the state of Michigan.

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The petition in the court below sets out that the said warrant had been drawn by the aforesaid auditor for the sum of four hundred and eighty (\$480) dollars for that amount, under a proceeding for a peremptory mandamus, and that when the said warrant had been presented to the treasurer for payment, that he (the treasurer) had refused either to pay it or indorse it; that then an application was made to the court below for a mandamus to compel its payment or indorsement, or to show cause why he did not do so, which, after argument, was made peremptory.

That the treasurer, by his solicitor, brought the case to this court by writ of error and assigned as error: 1. That the court erred in granting a peremptory writ of mandamus to compel the respondent to indorse the said warrant as prayed for. The case was submitted by Mr. Johnson, solicitor for plaintiff in error, and by Mr. Cook, solicitor for defendants in error, each citing the statutes of Wyoming.

The laws of the territory provide that the auditor of the territory shall draw all warrants on the treasury for moneys to carry on the affairs of the territory, and that the treasurer shall pay such warrants out of such funds in the treasury as shall be appropriated for that purpose; and in the event of there being no funds in the treasury to pay such warrants, it shall be the duty of the treasurer to indorse each warrant that it has not paid for want of funds. They also provide that no warrant shall be drawn unless an appropriation has been made by the legislature to meet it. But this territory, owing to the neglect of the legislature to make the necessary appropriation at its last session, has been placed in such a condition that it is impossible to carry on its functions without the necessary funds for that purpose. In this case the auditor has issued his warrant under the direction of one of the judges of the supreme court. It is true that the laws of this territory provide that no money can be drawn from the treasury except under an appropriation by the legislature, but that is under the supposition that the legislature will properly discharge its duties

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by making due provision for executing the legitimate functions of government. If the day after the legislature met that body had adjourned and left without performing any of the duties incumbent upon it, is it to be supposed that all the business of the territory must be suspended for the want of appropriations? Surely not. What then remains to be done? So far as the failure to provide for the expenses of the court is concerned, we were left in a state of chaos; and it only remains for the government to exert the latent power remaining in the hands of the people for their own protection. The law provides that the sheriffs of the several counties shall receive certain compensation for conveying prisoners to the penitentiary, and this is just as imperative as any other law on our statute books. And if no appropriation is made, and no money can under any circumstances be had, to bear the expenses of such removal of persons convicted of crime, we cannot see how that law is to be observed.

We, therefore, feel bound to see that the laws for the protection of the persons and property of our citizens be enforced, even if the legislature has failed to provide the means. But is there no provision in the law to meet such emergencies as have arisen under the circumstances in this case? By the act entitled "An act to provide for criminals, insane, and certain other persons, approved December 7, 1869, ch. 20, p. 305, Statutes of Wyoming, it is provided:

"Section 1. That in any county in this territory, when it became necessary to transport, or to transport and provide for any idiot, lunatic, insane, blind, deaf, deaf mute or criminal, to any eastern asylum, school or prison, it shall be the duty of the county commissioners of such county, upon proper and satisfactory representations to them, to apply to the governor for pecuniary or other aid in such case.

"Section 2. Then, if the governor approve the application, he is hereby authorized to call upon the auditor for a warrant upon the treasurer, in favor of the board of county commissioners, sufficient for the purpose, and it shall be

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placed in the hands of the county commissioners, who shall be officially and personally responsible for the proper application of such funds, as far as they may be able."

This is all that has been done in this case, and we fail to see any good grounds for complaint in the premises. The action of the district court in granting the peremptory mandamus, is approved and affirmed.

WOLCOTT v. THE TERRITORY OF WYOMING.

JURISDICTION—JUSTICES OF THE PEACE.—The organic act of Wyoming territory, provides that justices of the peace may have jurisdiction in civil and criminal cases not involving titles to lands or cases of felony, where the amount claimed or the penalty fixed does not exceed one hundred dollars, and as limited by law.

IDEM.—There is no limit to the penalty for the crime of assault and battery.

IDEM.—Hence justices of the peace have no jurisdiction of the offense, nor to hear, try and determine the same, but upon the charge would sit only, and have authority as committing magistrates.

ERROR to the First District Court for Laramie County.

This was a criminal prosecution for assault and battery, commenced before a justice of the peace, by complaint and warrant. After change of venue, under the statute, the case was tried before Justice Slaughter, of Laramie county, on the nineteenth day of December, 1871, and said justice of the peace on the same day, after consideration of the case, adjudged that the defendant, Frank Wolcott, pay a fine of ten dollars and costs of prosecution. An appeal was taken to the district court of said county, from the decision of the justice. A motion was made by the prosecuting attorney, in the district court, to dismiss the appeal from the justice's court. The district court sustained the motion, ordered the appeal to be dismissed and a writ of procedendo to issue to the justice to carry the judgment into effect. The defendant, by his attorney, excepted to the ruling of the district

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court. The case is brought to this court by a writ of error, and the defendant in the court below assigns as error:

I. That the district court erred in dismissing the appeal and affirming the judgment of the justice.

II. That the court erred in that it did not try the cause instead of dismissing the appeal.

III. That the court erred in refusing to reverse the judgment of the justice of the peace before whom the cause was tried.

E. P. Johnson, for plaintiff in error.

I. W. Cook, for defendant in error.

By the Court, CAREY, J. The only assignment of error which the court finds it necessary to consider, is the first one alleged, that is: That the district court erred in dismissing the appeal and affirming the judgment of the justice. The counsel for the plaintiff in error contends that the justice of the peace who tried the case had not jurisdiction of the offense, and for that reason all his proceedings were void.

The organic act of the territory provides "that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts and justices of the peace. That the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law, *provided*, that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed one hundred dollars, and the said supreme and district courts shall possess chancery as well as common law jurisdiction, and authority for redress of all wrongs committed against the constitution or laws of the United States, or of the territory, affecting persons or property."

It is plain that the jurisdiction of justices of the peace,

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in this territory, must now be as is limited by the laws of the territory so far as said laws are not inconsistent with the organic act. By reference to the act of the legislature, defining the jurisdiction of justices of the peace in criminal cases, we find (Sec. 1, Wyoming Laws, 1869, pp. 90, 91,) "That justices of the peace, in their respective counties, have jurisdiction of, and may hear, try and determine all public offenses less than felony, *except* as otherwise provided by law, in which the punishment prescribed by law does not exceed a fine of one hundred dollars, or imprisonment for six months."

We gain from this section to give the justice jurisdiction, except it be otherwise provided by law, to hear, try and determine a public offense, such offense must be:

1. Less than a felony;
2. Such offense "less than felony" must have a punishment prescribed by law;
3. Such punishment prescribed for an offense "less than felony" must be a fine not exceeding one hundred dollars, or imprisonment not exceeding six months.

If any public offense is deficient in any of these requisites, the justice of the peace has no jurisdiction to hear, try and determine it. The law of the territory defines "an assault and battery to be the unlawful beating of another." It is admitted that the defendant was tried under this law by the justice. Let us apply the test and find whether the justice of the peace had jurisdiction to hear, try and determine the case. Assault and battery is not one of the exceptions contemplated in the section defining criminal jurisdiction of justices of the peace; or in other words, it is not an offense otherwise provided for by law so that in respect to it the section of law named applies. The first question then to be determined: Is the assault and battery defined by the statute a public offense less than felony? We are unable to answer the question. The law is silent. The most that can be said is, that it is unlawful. If the plaintiff in error had been prosecuted for the common law offense of assault and battery, then the court would not for

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a moment hesitate to say that it is a misdemeanor. Again, is there a punishment prescribed for the assault and battery prescribed by the statute, which does not exceed one hundred dollars fine or six months imprisonment. This question must be answered in the negative, as the legislature has failed to prescribe any punishment whatever for the offense of assault and battery. Hence we must conclude that the offense for which the defendant was tried was not one of which the justice had jurisdiction.

But it was contended, since no objection was made to the justice hearing, trying and determining the cause on its merits, it is presumed that he had jurisdiction. In civil cases, where a statute does not give jurisdiction the consent of parties cannot give it: 5 Seld. (N. Y.) 35. If there be reasons for this being the law in civil actions, much stronger grounds exist for its being the law in criminal cases. The principle is well established that any act of a tribunal beyond its jurisdiction is null and void, and of no effect whatever: 33 Maine, 414; 13 Ill. 432; 21 Barb. (N. Y.) 9. Where the cause of action is not within the jurisdiction granted by law to the tribunal, it will dismiss the suit at any time when the fact is brought to its notice: 22 Barb. (N. Y.) 323. The courts of justices of the peace are of special and limited jurisdiction. They can take nothing by intendment or implication: 1 Nev. 100. The justices' jurisdiction in this territory depends upon express legislative enactment. Congress has expressly provided that their jurisdiction shall be as is limited by law, while the supreme court and district court shall have chancery and common law jurisdiction for certain purposes.

It is claimed that even if the justice had not jurisdiction of the offense, that by the appeal the district court obtained jurisdiction, and could have tried the case on its merits. The contrary doctrine is well established. The appellate court stands in the same position as the court of original jurisdiction. On an appeal, want of jurisdiction in the court below is equally a want of jurisdiction in the appellate court.

Judgment reversed.

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IVINSON & CO. v. ALTHROP.

BREACH OF CONTRACT—LIQUIDATED DAMAGES.—In a contract for the transportation of freight, it was provided “that in the event of either of the parties failing to comply with the terms of the contract, the party so failing was to pay the other party the sum of one thousand dollars, fixed and settled damages.” *Held*, that this was not intended, nor to be construed as meaning a penal sum; but as fixed, settled and liquidated damages, and the defendant was not permitted to show that the plaintiff had not sustained actual damages to that amount.

ERROR to the First District Court for Laramie County.

The following is the statement of the case as given by the court upon the delivery of the opinion.

This was an action on a written contract brought by Darius Althrop to the adjourned November term, 1871. The plaintiff's petition alleges that the defendants entered into a written contract thereto attached, and made a part thereof, in which it was stipulated among other things, that the plaintiff was to deliver at Fort Laramie in this territory, five hundred cords of wood for the use of the United States troops at said fort, such as would be received by the post-quartermaster, at the times and in the manner stipulated; and that one of the stipulations of the said written contract was, that in the event of either of the parties failing to comply with the terms of the said contract, the party so failing was to pay to the other party the sum of one thousand (1,000) dollars, fixed and settled damages. That in pursuance of the said agreement, the plaintiff hired several men as wood-choppers, teamsters, etc.; that he spent considerable time, labor and expense in fitting up and arranging his wagons for the purpose of hauling the wood; that he laid in a large stock of provisions, viz.: to about the value of four hundred (400) dollars; that he left home with his men, teams, and provisions, in time to commence fulfilling his part of the said contract; that after he had proceeded on his way some fifty or more miles, he was met by one of the partners of the defendants, and informed by him that he

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should not proceed further, as they would have to abandon the contract, from the fact that they, the defendants, had failed to procure the contract from the United States, and consequently they would have to break their agreement with the plaintiff; telling him further that he, the plaintiff, should return home and come to Laramie city; and they, the defendants, would settle with him. That plaintiff went within a few days to Laramie city for that purpose, but failed to procure a satisfactory settlement. Suit was then brought in the county of Laramie, a summons issued and served on Edward Iverson, one of the defendants. The case coming on for trial at the adjourned November term, on Tuesday, January 16, A. D. 1872, the defendant, by his attorney, Mr. Street, filed a general demurrer, which after argument was overruled by the court, Chief Justice Fisher presiding, to which ruling defendant excepted. Leave was then given to the defendants to answer by the next Thursday.

The answer of the defendant being filed a motion was made by defendant for a change of venue, which, after argument, was overruled by the court. On Monday, February 26, 1872, a jury was duly impaneled, and the case proceeded with the defendant excepting to certain rulings of the court in rejecting certain evidence offered by defendant, as will appear by defendants', now plaintiffs in error, bill of exceptions. The jury retired under the following charge of the court reduced to writing at the request of defendants' counsel:

"Charge: There was a contract in writing entered into between the parties to this action, which has been given in evidence on the trial and made a part of plaintiff's petition, and not disputed on the part of the defendant. One of the terms of this contract is, that if either of the parties fail to carry out in good faith any or all of the covenants and agreements specified in the written contract, the party so failing shall forfeit and pay to the other the penal sum of one thousand dollars, as fixed and settled damages.

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“Now it is contended by the plaintiff that this one thousand dollars mentioned in the written contract is the measure of damages to which they are entitled; while the defendants on the other hand hold that only such an amount can be recovered, as it has been conclusively proven to have been sustained by plaintiff by reason of the failure of the defendants to carry out the terms of the contract on their part.

“Now, gentlemen, the courts have held on this question on both sides; that is, they have sustained both the view taken by plaintiff and that taken by defendants. Some learned courts have held that the terms of the written contract settles the question, and that the one thousand dollars are to be treated as liquidated damages, while others, equally learned, have held that the measure of damages is to be found in the actual loss of profits, or in the difference between what the wood would have cost the plaintiff delivered at Fort Laramie and the amount he was to receive from defendants for delivering it.

“There is one point, however, in which there appears harmony in the opinions of the courts, and that is this: That whatever was understood by the parties at the time the contract was made settles the question as to the measure of damages, and what was the understanding of the parties must be learned from the language of the contract itself. Now if this contract merely said that for the true performance of all and singular the covenants and agreements herein contained, each binds himself or themselves to the other in the penal sum of one thousand dollars, then the measure of damages would have to be found by ascertaining what the plaintiff lost by the failure of the defendants to perform their part of the agreement.

“But the words of the contract are very definite; they go on to say that this sum of one thousand dollars was to be the fixed and settled damages. Now it is claimed that the plaintiff has sustained damages beyond the sum of one thousand dollars, but the plaintiff having brought his action for but one thousand dollars, he is limited to that amount.

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My view of this case then is, that the contract fixes by its own terms the amount to which the plaintiff is entitled, and having brought his action on this hypothesis, he cannot recover any other sum.

“Your verdict, then, should be for the plaintiff, and assess the damages at what you find to be right under the contract.”

Under this charge the jury returned a verdict for plaintiff for one thousand dollars. A motion was then made for a new trial, which was overruled.

The defendant, by his counsel, then brought up his case on a writ of error, and assigned the following points of error:

I. The court overruled the defendant's demurrer, to which he excepted, and the court overruled the defendant's application to have the venue of this cause changed, to which he excepted.

II. The jury erred in the assessment of damages, making the same too large.

III. The verdict is not sustained by sufficient evidence.

IV. The court erred in sustaining the objections of the plaintiff to certain testimony offered by the defendant at the trial, and the court erred in its instructions to the jury, whereby and by reason of all which injustice was done to the defendant on the trial of said cause.

Thomas J. Street, for plaintiff in error, cites: Sedg. on Damages, 392, 575; 14 Gray, 165; 21 Wend. 456; Code, sec. 700. On the question of the court overruling the testimony of defendant's witnesses: Graham & Waterman on New Trials, 666, 674; and upon the effect of the instructions to the jury: Graham & Waterman, 725, 763; 19 Wend. 402; 12 Mass. 22; 11 Pick. 367; 16 Wend. 676; 12 Johns. 513; and upon the question of change of venue: Code, secs. 58, 59.

W. W. Corlett, for defendant in error, cites first on the

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question of the demurrer of defendant: Sedg. on Dam. 682; 4 Iowa, 551; 3 Id. 209. On the question of a change of venue: Civ. Code, secs. 58, 59; Voorhies Code, 148-152. On the rejection of the evidence: Sedg. on Dam. 223, 459. On the instructions to the jury: 4 Wend. 484; 8 Id. 109; 4 Kern. 310; 4 Seld. 37; 2 Id. 233; 1 Kern. 416; 1 Seld. 422, Graham & Waterman, 862 *et seq.*; 1 Denio, 162. Upon the question of the misdirection of the court as to its effect, where no injustice has been done: Graham & Waterman, 862; 9 Cowan, 680.

And as to whether the contract is binding on the parties, so that the measure of damages is to be ascertained by the terms of the written agreement, or whether the measure of damages is to be ascertained by proving the actual loss sustained, he cites: Sedg. on Meas. of Dam. 412; Id. 421; 13 Gray, 42.

Mr. Street, in his reply, by consent, cites: 4 Iowa, 551; 21 Wend. 426.

By the Court, FISHER, C. J. The first part which presents itself to this court, in accordance with the line of argument pursued by the counsel on both sides of this case, is whether the court below erred in overruling the defendant's (in the court below) demurrer. Of this there cannot be any doubt when we consider the office of a demurrer. Mr. Chitty, in his work on pleading, than which there is no higher authority, lays down the maxim that a general demurrer goes to the whole of the declaration, or in this territory the petition, so that if a general demurrer be filed to the declaration or petition, in order to sustain the demurrer, the declaration or petition must be defective in every part, and if the plaintiff in the action has set out in his petition, any one cause of action which can be sustained by the evidence, however defective his petition may be upon other points, the defective parts must be met by a special, and not by a general demurrer. On the subject of a change of venue,

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we find no provision in the civil code of this territory, authorizing a party to an action to apply for this remedy, except what is provided for in section 59 of the code of civil procedure of this territory, which is where it is provided :

“ That if a party to an action shall make affidavit that he believes that from the bias, prejudice or partiality of the judge, he cannot get a fair and impartial trial, the court shall change the place of trial to some other district ; or for the convenience of parties, the judge may request the judge of some other district to try the action in the county where the suit is pending.”

Now, in this case there was no such affidavit made, and of course it was not obligatory on the court below to order such change, hence we can discover no error in this respect. The most important error assigned by the plaintiff in error or defendant below is, that the court erred in sustaining the plaintiff's (in the court below) objection to evidence offered by the defendants below on the question of the measure of damages.

It depends upon what view the court below took as to what established the measure of damages. If the court held, as it appears to have done, that the written contract determined the measure of damages, it would have been enough to have permitted the written contract to have been proven, and then to have allowed the plaintiff below to have shown that its terms had been broken by the defendants, and then to have instructed the jury that the measure of damages was settled by the contract itself, and if so, no other evidence should have been allowed, except to show some circumstance by which it could be made to appear that the contract had been broken by some act of the plaintiff below. The exception to the charge of the court below on the subject of its instructions is somewhat of the same nature of the general demurrer. We think that the exception to the charge of the court should be not to the

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whole charge, but to some specific portions of it, unless it was wrong in every part, and this we presume will not be claimed. In the fourth of Kernan's Reports, page 310, it was held that a general exception to a charge of the court containing distinct propositions is unavailing, unless the party excepting show that each proposition is erroneous. In the same case the court of appeals of the state of New York held that a general objection to the charge is not sufficient, the objection must be to some specific point of the charge.

In this case we fail to see that the charge is erroneous in any one of the propositions.

On the subject of the measure of damages, it was held in a case cited in Sedgwick on the Measure of Damages, page 412, that an action was brought on a written contract; the defaulting party to the instrument agreed to forfeit the sum of eight hundred dollars, fixed and settled damages; that the words of the contract were held to be too express to be questioned, and the land not having been conveyed according to the terms of the contract the sum was treated as liquidated damages. The same doctrine was held in the courts of Massachusetts and several of the other states. The question of actual damages is one that often becomes quite difficult to determine, and in the case under consideration this difficulty seems to present itself. A party is justified in claiming damages not only on actual loss of outlay but for a failure to realize anticipated profits; and while it would be impossible to estimate the exact amount of damages sustained by the breach of the contract, there is a rule established by the contract itself which, from the definiteness of its terms, appears to have been clearly understood by the parties when the contract was signed, hence the jury were relieved of the labor of ascertaining the actual amount by parol evidence; and we are of the opinion that the court below was right in its instructions to the jury to take the contract as liquidated damages.

It is held by the counsel for the defendant in error that

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notwithstanding the instructions may have been wrong in some particulars, yet if substantial justice was done that then the verdict should not be disturbed. This doctrine is so well established that we deem it useless to enlarge upon it here; but we do not apprehend the necessity of applying the principle to this case, inasmuch as the verdict is fully justified upon the terms of the contract.

The judgment is affirmed.

FIELDS v. THE TERRITORY OF WYOMING.

INDICTMENT—PROOF.—It is immaterial what date is alleged in an indictment as the day on which a crime was committed, provided such day be prior to the finding of the indictment and within the time prescribed by the statute of limitations.

IDEM.—But the rule as to proof under an indictment is not so liberal as it must be confined to a given crime and to a given time.

IDEM.—The prosecution on a trial under an indictment so drawn that it might cover a dozen different offenses of the same nature, after examining the first witness as to one offense on a day certain, must confine its proof to that particular offense, and the admission by the court of evidence tending to prove other offenses is error.

IDEM.—Evidence of a distinct substantive offense cannot be admitted to aid in proving the commission of another offense.

ERROR to the District Court for Laramie County.

The statement of this case is fully set forth in the opinion.

I. W. Cook, for the territory, cited: 2 Park. C. R. 583; 1 N. Y. Dig. 838; 1 Whar. Crim. Law, secs. 599, 600, 631–635.

W. W. Corlett, for plaintiff in error, cited: 1 Whar. Crim. Law, 647–652; 2 Cush. 590; 2 Park. C. R. 583; 3 Id. 681; 1 Greenl. on Ev. sec. 53; 2 Gray, 354; 21 Pick. 515.

By the Court, CAREY, J. The defendant was indicted at the November term, 1871, of the district court, first judicial

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district, under chap. 27, statutes 1869, section 8, for the crime of permitting a certain game of chance to be played in a house under his control, for money, etc. The indictment alleges that the defendant “on the first day of January, in the year of our Lord one thousand eight hundred and seventy-two, and on divers other days and times before and since that day, at the county aforesaid, county of Laramie, unlawfully did keep and deal, and permit to be kept and dealt in a building under his control, a certain game of chance played with cards for money and other representatives of value, commonly called and known as ‘poker,’ contrary to the form of the statute,” etc.

At the same term of the district court, the defendant was arraigned on said indictment and plead not guilty, and trial was had by jury, and a verdict of guilty rendered. Before judgment, the defendant, by his counsel, made a motion to set aside the verdict of the jury, and that the court grant a new trial. The motion, after argument, was overruled by the court. The reasons assigned in the motion for a new trial, are virtually the same as those set forth in the petition in error, which are as follows, to wit:

1. That the district court erred in admitting certain testimony offered by the prosecution and objected to by the defendant.
2. That the district court erred in its instructions to the jury, and in refusing to give certain instructions requested on the part of the defendant.
3. That the district court erred in overruling the motion of the defendant to set aside the verdict of the jury and grant a new trial.

The section of the statute under which the indictment was found, provides that certain games may be licensed; but the game of poker is not included among these, and consequently the game of poker, as alleged in the indictment, falls under that clause of the section which provides that “any person or persons who shall keep or deal, or permit to be kept or dealt in any building or place under his or

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their control, any other banking or other game of chance for money, or other representation of value, played with cards, shall be deemed guilty of a misdemeanor," etc. That which constitutes the misdemeanor under this section is not the keeping of a gaming house, but the keeping and dealing, or permitting to be kept or dealt, any game of chance with cards for money, etc., in any building or place under one's control, which game is not authorized to be licensed by the statute. The doing or permitting either of the acts prohibited in itself, constitutes an offense, and as often as one does or permits either of the acts to be done he commits a distinct misdemeanor.

In the trial in the district court, the first witness called on the part of the prosecution, E. W. Keplinger, testified that about the seventh or eighth of January, 1872, at the place of the defendant, he saw a game of chance, called poker, played with cards for checks and money. The next witness called, P. B. Danielson, was asked the following question by the prosecution, viz: "State whether or not you ever saw any game of poker played in the building kept by or under the control of the defendant within two years next prior to the twenty-seventh day of January, 1872?" This question was also asked J. A. Jefferson, a witness on the part of the prosecution. In each instance the question was objected to by the defendant on the ground that the evidence in the case must be confined to the particular game concerning which evidence had already been given to the jury, and to the same time as that mentioned by witness Keplinger. The court overruled the objections and permitted the questions to be asked and answered. It is upon the rulings of the court upon these questions that the first error assigned is based.

It is immaterial what date is alleged as the day on which a crime was committed in an indictment, provided such day be prior to the finding of the indictment and within the time prescribed by the statute of limitations; but the rule as to proof under an indictment is not so liberal, as it must be confined to a given crime and to a given time.

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For instance, in this case, the indictment may have covered either of a dozen distinct offenses under the section of the statute upon which the indictment was founded. That is, William Fields may have been guilty of keeping or dealing, or permitting to be kept or dealt in a building under his control, the particular game of poker, as prohibited by the statute, on a dozen different times and occasions previous to the finding of the indictment, and within the time fixed by the statute of limitations, but on the trial on the particular indictment, the prosecution should have confined the proof to one distinct offense, if more than one offense had been committed. Evidence can only be offered tending to prove one distinct offense, and when such offense has been fixed as to time and place, the proof should be confined to it alone, the rule being that evidence of a distinct, substantive offense, cannot be admitted in support of another offense. In this case, the prosecution, by the witness Keplinger, fixed a time when the alleged misdemeanor, as charged in the indictment, was committed, and all evidence not tending to prove this alleged misdemeanor, on objection of defendant, should have been ruled out by the district court.

This disposition of the first error assigned, disposes also of the second and third, as the latter two grew out of the first.

Judgment of district court reversed, and new trial ordered.

Statement of Facts.

PHILLIPS *v.* THE TERRITORY OF WYOMING.

CRIMINAL PRACTICE EVIDENCE—NEW TRIAL.—In proceedings in error in a criminal case to obtain the review of the orders, rulings and decisions of the lower court, and one of the errors assigned being: "That the verdict is not sustained by sufficient evidence and is contrary to law," the record must show all the evidence to enable this court to pass upon the question.

INDICTMENT—CHARGE OF COURT.—Under the statutes of the territory of Wyoming, upon the trial of an indictment for murder in the first degree, it is not erroneous for the court to instruct the jury "that if they find from the evidence that the homicide was perpetrated purposely and maliciously, but without deliberation and premeditation, they might and should find the defendant guilty of murder in the second degree."

IDEM.—A conviction will not be disturbed, unless there be a decided preponderance of evidence in favor of the prisoner.

IDEM.—A defendant in a criminal action cannot claim a new trial on the ground that the jury found him guilty of a lesser grade of the offense charged in the indictment than the evidence warranted.

ERROR to the District Court for Laramie County.

The following is the statement of the case filed by the judge writing the opinion:

The defendant, Frank Philips, was indicted at the July term, 1871, of the district court, Laramie county, first judicial district, for the crime of murder in the first degree. At the same term he was arraigned on said indictment, and after interposition of plea of not guilty, was tried on said indictment and plea by jury and found guilty of murder in the second degree. Thereafter at the same term, defendant by his counsel made a motion to set aside the verdict of the jury and to grant a new trial, which motion after argument by counsel was overruled by the court. The reasons assigned in said motion to set aside the verdict were as follows:

1. That the verdict is not sustained by sufficient evidence and is contrary to law.

2. That the court erred in instructing the jury "that if they found from the evidence that the homicide was perpetrated purposely and maliciously, but without deliberation

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and premeditation, they might and should find the defendant guilty of murder in the second degree.”

H. Garbanati, for plaintiff in error.

I. W. Cook, for defendant in error.

By the Court, CAREY, J. It does not appear by the record by what process this case is brought to this court, but as counsel for the territory and counsel for the defendant have argued this cause (without objection) upon the questions presented in the motion for a new trial in the district court, this court will decide upon the questions so presented. The first reason assigned in the motion is, that the verdict is not sustained by the evidence and is contrary to law. Section 145 of the code of criminal procedure provides among other things, “where the grounds of exception are that the verdict is not sustained by sufficient evidence or is contrary to law, and the court has overruled a motion for a new trial made on that ground, the bill of exceptions shall substantially set out the evidence.” Notwithstanding this provision of law it would be impossible for this court to decide that a verdict rendered in a district court was not sustained by evidence unless the record shows all the evidence. If this court is to be governed by reports of evidence which purport to be substantially true, we can conceive of cases where it may do manifest injustice to parties as well as to the rulings and decisions of the district courts.

In this case, the counsel for the territory and the counsel for the defendant, do not agree that the record contains all the testimony. But supposing that it does, then this court would not be justified in disturbing the verdict of the jury. The jury are the judges of the facts. The law is well settled that a court, especially a court of errors or appeals, will not disturb a verdict of a jury where the question is wholly one of fact, unless it is clearly against the weight of evidence. “A conviction will not be disturbed, unless there be a decided preponderance of evidence in favor of

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the prisoner:" *People v. Ah Loy*, 10 Cal. 301-312; 12 Ills. 460. In this case, the court finds from the record, that there is evidence upon which the jury could have based their verdict of guilt.

In the case of *Cox v. State*, 32 Texas, 610, the court held "that as the supreme court had not the same opportunity as that of a district judge, for coming to a correct conclusion as to the correctness of the verdict, a supreme court will not disturb a verdict on the ground that it is contrary to the evidence, unless the record makes it most manifest that material error was committed by the jury." It was contended in argument by the attorney for the defendant, that the evidence in their case, if it proved the defendant guilty of anything, it was murder in the first degree, and not murder in the second degree, as found by the jury. Admitting the proposition to be true, can the defendant take advantage of it? He has no cause for complaint. By statute in this territory, a person indicted for murder in the first degree, can be found guilty of murder in the second degree. The law is well settled that if a defendant is convicted of a lesser felony than that charged in the indictment, he cannot again be tried for the greater, nor can a defendant claim a new trial on the ground that the jury found him guilty of a lesser grade of the offense charged in the indictment than the evidence warranted. This question is settled by the case of *Commonwealth v. McPike*, 3 Cush. 181. In this case one of the points raised by the bill of exceptions, presented the question whether upon an indictment for manslaughter, the defendant must be acquitted if the evidence satisfied the jury that the homicide was committed with malice aforethought. The court held that in such a case the party on trial had no reasonable ground for complaint, that it is not for him to say that his crime has another element in it which, if charged in the indictment, would have constituted it a higher offense and more severely punishable.

So in this case, all the elements of murder in the second

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degree are contained in murder of the first degree, and if the jury convicted the defendant of the lesser offense, when the evidence would have warranted them in finding him guilty of the greater, he has no reason to complain. It is argued that the court below erred in instructing the jury, the only instruction recited in the motion for a new trial, is in the language of the statute defining murder in the second degree, and it is clear this instruction in this case was not erroneous.

Judgment affirmed.

BROWN, SUPERINTENDENT OF SCHOOLS OF ALBANY COUNTY, v. NASH, TREASURER OF SCHOOL DISTRICT No. 2 OF ALBANY COUNTY.

LEGISLATIVE PROCEEDINGS—PASSAGE OF BILLS.—Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon the evidence and judge the statute void.

VETO.—In order to pass a bill in the legislature over the governor's veto, the bill must receive two thirds of the votes of the members actually present. Two thirds of those voting are not sufficient, if other members are present.

MANDAMUS.—Where the county superintendent of public schools refuses to pay over money belonging to any district, or to make the proper order for the application of such money, the proper proceeding of the party aggrieved is by writ of mandamus.

VESTED RIGHTS.—Even where the legislature so changed the boundaries of counties that a school district formerly belonging to one is subsequently embraced in the other county, if school moneys have, prior to the passage of such act, become due from the former county to such district, said district has a vested right therein, and a writ of mandamus will lie to compel the payment thereof.

ERROR to the District Court for Albany County.

The opinion sufficiently states the case.

Argument for Plaintiff.

M. C. Brown, plaintiff in error, in person, contended that by stipulation on file the only question to be determined by the court was: Did Council File No. 15, entitled a bill for an act to define the boundaries of Laramie county, as printed in the printer's volume of the statutes of the second session of the legislature of Wyoming territory, become a law by its passage, notwithstanding the veto of the governor?

In this connection it is well to examine the character of the "veto" popularly and erroneously so called, but more properly designated by the word "negative." See 1 Kent, 249, 250, 251 and note a; also second subdivision sec. 7, art. 1, Const. U. S.; also 1 Story's Com. secs. 883 to 891.

It appears by reference to the organic act of Wyoming, section 6, that the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the provisions of this act and the constitution of the United States. It is clear that the establishment of municipal corporations and the definition of their boundaries is a rightful subject of legislation; and it will be observed that the previous territorial legislature never defined the boundaries of Laramie county, so that at the time of the passage of the act in question there was actually no such political corporation as Laramie county designated by law, and yet in sections 7 and 15 of the organic act the division of the territory into counties is plainly intended to be made.

The negative of the governor renders a two thirds vote necessary to enact a law against it: Organic Act, section 6. Who shall decide whether the bill passed over the veto or negative by the requisite vote? This language, controlling the action after veto of the governor, is precisely that used respecting the president's exercise of the same prerogative. Let us examine the parallel. The constitution does not say whether the vote of two thirds of each house on the reconsideration of a bill returned by the president with objections shall be two thirds of the members elected or two thirds of the members present. It is understood that the

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latter construction has been adopted in practice: 1 Kent, 250, note b.

So that it becomes necessary to inquire who are "present" in the meaning and usage of parliamentary law; certainly those who are without the bar of the house are "absent," and in the national congress would not count in a two thirds or any other vote: *Barc. Dig.* 168; *Rules* 30 and 31 of *House of Representatives*, and note thereto.

Had the house of representatives of this territory the power to make rules defining its quorum and its mode of procedure? Most assuredly it did so: See *House Journal*, 1871, p. 28, rule I. "A majority of the house shall constitute a quorum." A quorum was present.

Also *House Journal*, 1871, p. 33, rule 39, "The ayes and nays shall be taken, etc., etc. Every member within the bar shall vote when his name is called, unless for special reasons he be excused." If a majority were present the quorum was there, and unless the persons excused should reduce the number voting below a quorum, no earthly reason exists why the ones excused from voting are not in effect absent as completely as those who are physically without the bar of the house, so far as official action is concerned. It is a grave question whether the courts have power to go behind the printed statutes to determine a question of this character, which is in its nature a question of parliamentary practice.

In the third of *Gray's Reports*, 468, it is said in substance: "The Massachusetts house of representatives possess inherently, and without constitutional expression, the power to expel a member; and the court cannot inquire how they exercised that right nor their reasons for exercising it, nor whether the member had an opportunity to be heard in his defense before expulsion. See also, *Cooley's Const. Lim.* 141: "A simple majority of a quorum is sufficient for the passage of any particular law, unless the constitution fixes some other rule, and where by the constitution a two thirds or three fourths vote is made essential to the passage of any

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particular class of bills, two thirds or three fourths of a quorum will be understood, unless it is expressly declared that this proportion of all the members, or of all those elected, shall be requisite."

In New York the two thirds or three fifths vote required for the passage of certain bills, is declared by the constitution of New York to be "that proportion of all those elected." See to the same effect, *Anderson v. Dunn*, 6 Wheat. 204; also a strong case, where it is held that "the courts have no power to go behind the printed statutes to pass upon the action of the legislature," is the *B. & N. F. Railroad v. City of Buffalo*, 5 Hill. 509; and in *Mayor, etc., v. Harwood*, 3 Am. Rep. 161, it is declared "that no evidence was admissible to show that all of an act of the legislature was not included in the bill signed by the Governor"; and in *Hunt v. Van Alstyne, etc.*, 25 Wend. 608, it is held that the legislative body is the proper tribunal to determine the passage of its bills, subject only to an appeal to the people. In 3d Ohio State Rep. 484, in *Gibson v. The State*, the court says: "True, the courts are made the judges, in the last resort, of the constitutionality of all laws; and as before remarked, where a statute is on its face strictly unconstitutional, it is their duty so to declare it; but it does not necessarily follow that they are authorized to supervise every step of legislative action and inquire into the regularity of all legislative proceedings that result in laws."

Concerning the rules governing the courts in adjudicating laws to be unconstitutional, and the care necessary for judges to exercise in approaching such a consideration, and the delicacy with which such considerations have always been undertaken, see Cooley's Const. Lim. 159, ch. 7, the whole of which is replete with sound reasoning, and supported by strong citations. In other cases in New York, reported in 8 N. Y. and 4 Hill, and referred to in appellee's brief, it will be observed that the courts examined the journals to see if they show "a two thirds vote of all the members elected by the people," that being a con-

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stitutional provision, and also whether the bills was certified by the presiding officers, that being also a constitutional provision, while no such provisions are found in the organic act, that instrument only requiring "two thirds of the house" to vote.

Clearly the term "house" means such number as it may by rule prescribe. "House" means a quorum; seven members are a majority, and a quorum, two thirds of that number, may pass over the voto; or else the majority of that number could pass no bill or perform no legislative act of any kind: Cooley's Const. Lim. 141. This argument would be incomplete without referring to the danger that exists of the court going beyond its jurisdiction in assuming to pass upon the manner in which a co-ordinate branch of the government may discharge its functions. Of the power of courts to pass on the question as to the matter of legislative enactments, which has been declared by the legislative branch of the government to be existing laws, and to determine whether they accord with the constitution. no doubt exists. But can the courts go further, and control legislative discretion and the manner in which laws shall be passed? If so, where will the court stop?

Upon the question of the disposition of courts, being lawyers, to naturally tend to enlarge their jurisdiction, it may not be idle to recur to the opinion of Mr. Jefferson: See Jefferson's Complete Works, p. 462 of sixth volume, and pp. 133, 177, 298, of seventh volume. In the letters of Mr. Jefferson, so cited, may be found admonitions that ought to sink deep in the mind of every judge, and while his views have not obtained in all their strictness on the point as to the power of courts to declare laws unconstitutional, they are yet worthy of the careful consideration of all jurists who have any respect for our theory of government and any desire to protect each of its co-ordinate branches against any unwarrantable encroachment on the part of either of the others.

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W. W. Corlett and S. W. Downey, for defendant in error, contend:

I. That the bill in question, having been vetoed by the governor, it must have been passed in each house by a two-thirds vote of each house respectively to become a law: See sections four and six of the act of congress, organizing the territory of Wyoming.

II. The courts have the right and power to determine for themselves, whether or not any bill has been passed by the requisite vote to become a law: See *Cooley's Const. Lim.* 135, 140, 141; 2 *Am. R.* 430; 1 *Denio*, 9; 4 *Hill*, 384; 8 *N. Y.* 317; 14 *Gray*, 238.

III. As to what constitutes a two thirds vote of each house, see subdivision two, of section six, article one, of the constitution of the United States, and compare the same with section six of the organic act of Wyoming territory; also see sections 35 and 37, 142-3 of *Jefferson's Manual*; also *Barc. Dig.* 214; 14 *Gray*, 238; 1 *Kent.* 250, note b.

By the court, FISHER, C. J. This was an action brought from the district court of Albany county, at the March term, 1872, on an appeal from a decree of said court, awarding a peremptory mandamus to compel the defendant in the court below, and now plaintiff in error, to pay over to the petitioner the sum of two hundred and seventy-eight dollars and eighteen cents, being the balance due on a warrant drawn on M. C. Brown, as superintendent of schools for Albany county, by the president and secretary of the school district number two of Albany county, consisting of the village or district of Sherman. The whole amount due to said district as set apart for its use by the said M. C. Brown, as such superintendent as aforesaid, was three hundred and sixty dollars and sixty-eight cents, which sum the said district number two, was entitled to receive out of the money appropriated for school purposes. That some time after the said sum of three hundred and sixty dollars and sixty-eight cents was so appropriated, a warrant was drawn by A. J.

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Nash, treasurer of school district number two, which was duly signed by the president and countersigned by the clerk, and presented to M. C. Brown, as superintendent, and a part payment made to wit, in the sum of eighty-two dollars and fifty cents, and a credit for that amount marked on the back of the warrant. And it is further alleged, and is not denied that the said M. C. Brown refused to pay any further sum on account of the said appropriation. Application was then made to the district court for an alternate writ of mandamus to compel the said M. C. Brown to pay the balance of said appropriation. The alternate writ was granted at the March term of the court for Albany county, by Chief Justice Fisher, and made returnable on the eighth day of said month of March, directing him to pay the sum claimed to be due, or show cause why he has not done so.

On the eighth day of March an answer to the alternate writ of mandamus was filed by M. C. Brown, setting forth his reasons why he had refused and still did refuse to pay over the said balance, to wit: "That the plaintiff should not have his peremptory writ of mandamus, because that the territorial legislature at its last session, which convened at the city of Cheyenne, the capital of the territory of Wyoming, on the sixth day of November, 1871, passed a certain bill entitled, an act defining the boundaries of Laramie county. That said act originated in the territorial council, was duly passed by said council, afterwards was passed by the house of representatives, and presented to the governor for his approval; that it was not signed by the governor, but was by him returned with his objections, within the time designated by the original act, to the council said bill having there originated; that the bill then passed the council by a two-thirds vote of the members thereof, and became a law, so far as that body was concerned, the objections of the governor to the contrary notwithstanding.

That afterwards the said bill was duly transmitted to the house of representatives with the governor's objections, and on the question being submitted to the house: Shall the bill

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pass, the objections of the governor to the contrary notwithstanding? there were seven members of the house who voted aye, three voted no, two were absent and one excused. The speaker of the house then declared the bill passed, the objections of the governor to the contrary notwithstanding. The bill was afterwards duly returned to the proper committee of the legislature and delivered to the secretary of the territory, was placed on file by him, and so became a law of said territory.

And further in answer, the said defendant, M. C. Brown, says, that by the terms of said bill the town of Sherman, school district No. 2, became a part of Laramie county, and is now by a law of said territory a part of Laramie county, and by reason thereof not entitled to receive any school money in the hands of the superintendent of schools for the county of Albany.

By an extract from the journal of the proceedings of the house of representatives of the legislature of Wyoming, it appears that when the question of the passage of the bill was about to be taken, Mr. Sheeks the speaker of the house, asked to be excused from voting; that, on motion of Mr. Clark, a member of the house, Mr. Sheeks was excused. That the yeas and nays being called resulted as follows: Yeas: Messrs. Blair, Castle, Clark, Friend, Knykendall, Talbot and Wilson—7. Nays: Messrs. Brown, Dayton and Hayley—3. Absent: Messrs. Nickerson and Pease—2. Excused: Mr. Speaker.

After argument by counsel for and against the writ being made peremptory, Kingman, J., who was presiding instead of Fisher, C. J., awarded a peremptory writ of mandamus as prayed for. The case as presented to us raises several questions, among which are: 1. Have the courts power to go behind the printed volume of the laws of the territory, duly certified by the territorial secretary, to ascertain whether these laws were passed in accordance with the provisions of the act of Congress organizing the territory of Wyoming? 2. If the courts have such power, was the act entitled "an act

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defining the boundaries of Laramie county," passed in such manner as to constitute it one of the laws of Wyoming territory? and, 3. Should the peremptory writ of mandamus have been allowed?

That the courts have the power to examine the journals of the legislature to see whether the requisite forms of legislation have been observed in the passage of laws, is a question which has arisen in several, if not all of the states of the Union; and wherever it has arisen it has been determined in the affirmative, and if had not been raised, it strikes us that it would require but a superficial view of the question to determine the propriety of the course. While there are recognized in our form of government in the United States and in the several states three several co-ordinate branches, viz.: the executive, legislative and judicial, it seems to us that the latter branch is invested with the power of the execution of the laws, and at the same time given the power to examine whether the laws, as passed by the legislative branch and approved by the executive, come in conflict with the organic law of the state or not; and if they do, it becomes their duty to point out such conflict, so that the defect may be remedied by subsequent legislation. That the courts have exercised such a prerogative may be seen in the cases cited in Cooley's Constitutional Limitations, p. 135, where the author uses this language: Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon the evidence and adjudge the statute void: referring to *Spangler v. Jacobs*, 14 Ill. 297; *Miller v. State*, 3 Ohio N. S. 475; *People v. Mahoney*, 13 Mich. 481; *Southwark Bank v. Commonwealth*, 2 Pa. 446. The same doctrine was held in the cases of *Hapending v. Haight*, 39 Cal. 189; *Debord v. People*, 1 Denio, 9; 4 Hill, 238, and a large number of other cases.

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The second point raised in the argument of this case is one which presents a point remarkable for the delicacy of its distinctions, and it is one on which, after a diligent search, we have been unable to find a precedent. It is a question as to what constitutes two thirds of a legislative body under peculiar circumstances.

From an examination of the journal of the house of representatives of the territory at the time the bill in question was under consideration, after it had been returned by the governor with his objections, it appears that there were eleven members present up to the time that the vote was about to be taken; that the speaker, for some reason unknown to us, requested to be excused from voting, which request was granted, the roll was then called and the yeas and nays recorded. Under ordinary circumstances the failure of the speaker to respond would be a satisfactory conclusion that he was absent, and that there being three members above the number required to constitute a quorum, two thirds of the members present having voted in favor of the passage of the bill over the veto of the governor would leave no doubt that it received the requisite vote to give it the force and sanction of a law, as much as though it had received a unanimous vote of the house. But while the journal of the proceedings of that day shows, that although the speaker did not vote on the passage of the bill, that he was present for all other purposes, because the journal shows that the speaker arose and announced the passage of the bill, thus showing his actual presence. Now, if one of the members on the floor had asked to be excused, and had been so excused, there would perhaps have been nothing to show his presence, and the vote would have been complete. But the speaker having made the request places the question in an entirely different aspect. There is a question which arises incidentally in the discussion of the case before us, and although it has not been alluded to in the argument, yet it is one that we are bound to take notice of, because the journal of the house has been referred to, and we have been asked

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to take judicial knowledge of the fact, and that is, that this law never was asked for by the citizens of either county, but on the contrary, after the bill had passed both houses and had gone to the governor for his approval, a petition was presented to him signed by a large number of the citizens of Sherman (we believe by a majority of them), asking him to return it with his objections.

While this would not deprive the legislature of the power to pass the law, nor would it affect its validity when passed, it seems to us to justify us in holding the action of the legislature to strict rules of construction. This, being in our view, obligatory upon us, compels us to see that before the interests or supposed interests of any portion of the citizens are affected, that the forms of law must be strictly complied with. Now if the speaker of the house was present, whether he voted or not, there were eleven members present, and it would require more than seven votes to make two thirds. The law is not that one third voted against the bill, but it is that two thirds of the members present did vote for it. Now, if the speaker was present, no matter whether he voted for it or not, then there were eleven members present, and it would require at least eight votes to constitute two thirds; if he was absent, then there were but ten votes, and seven would be two thirds. If then the speaker was absent, how could he immediately after the reading of the votes by the clerks, announce that the bill had passed, the objections of the governor to the contrary notwithstanding? So that it appears to us very clearly that this law was not passed in accordance with the provisions of the constitution of the United States, or the organic act of this territory, from the fact not that it did not receive two thirds of the votes recorded, but that it did not receive the votes of two thirds of the members present, and therefore is not one of the laws of the territory.

The third question raised is, should the peremptory writ of mandamus have been allowed? From what we have said above, we are clearly of the opinion that the order of the

Points decided.

court in allowing the writ was right, but if there should be any doubt in our minds upon the point discussed, there is another consideration which fully warrants us in concluding that the writ should have been allowed, and is that the division of the school fund had been made previous to the passage of this law, defining the boundary of Laramie county, the portion belonging to school district No. 2 had become vested, a portion of it had been paid, and all of it had become due and payable; and, in our opinion, belonged to that district, and to no other person or place, and the superintendent of schools for Albany county should have paid the balance due, and his failure to perform that duty was good grounds upon which to justify the officers of the district in applying for the remedy provided, and they having made the application, it became the duty of the court to enforce the payment by its writ of mandamus.

The proceedings are approved.

THE UNION PACIFIC RAILROAD COMPANY, A CORPORATION, v. CARR, SHERIFF AND EX OFFICIO COLLECTOR OF THE COUNTY OF LARAMIE, AND BOSWELL, SHERIFF AND EX OFFICIO COLLECTOR OF THE COUNTY OF ALBANY.

INJUNCTION—COLLECTION OF TAXES.—Where the collection of illegal taxes against a railroad company may work an irreparable injury, an injunction against the collector and other county officials will be granted.

POWER OF COUNTY OFFICERS.—In the territory of Wyoming, where a question arises as to the line between different counties and the assessment of property upon the territory in dispute, the board of county commissioners or the board of equalization of either of the counties interested, is not a proper or competent tribunal to decide in which county a person or corporation shall pay taxes.

PRACTICE.—Under such circumstances an application by bill of complaint by the taxpayer to a court of chancery, for an order that the parties in interest interplead, and for a perpetual injunction against those in error, is a proper course.

VETO.—In order to pass a bill in the legislature over the governor's veto, the bill must receive two thirds of the votes of the members actually present; two thirds of those voting is not sufficient if other members are present.

Statement of Facts.

• THIS cause came to this court in accordance with the following stipulation :

It is agreed by and between the parties to the above entitled cause as follows :

1. That an appearance shall be entered by the said defendants respectively in said cause, without process issuing, on or before the eleventh day of November, A. D. 1872, and that the said defendants on or before said date plead, answer or demur, or file exceptions to the bill of complainant herein, and that the said complainant file a replication, if he so desires, in said cause on or before said date ; 2. That a certified copy of all the papers and proceedings in the cause be transmitted by the clerk of said court and register in chancery therein, to the clerk of the supreme court of said territory, to be filed in said supreme court on said eleventh day of November, 1872 ; 3. That all the issues in this cause be heard, argued and determined, and that final order and decree be made and entered in said cause by said supreme court, in all respects the same and with the same force and effect as though the said cause had been regularly and duly taken to said supreme court by appeal at the adjourned session of said supreme court, commencing on said eleventh day of November, A. D. 1872.

The bill of complaint alleged the following :

That the complainant was a corporation owning and running a railroad and telegraph line through the two counties above-mentioned. That the said territory of Wyoming and the said counties of Laramie and Albany claimed the right to assess and collect taxes for territorial and county purposes upon the property of complainant, the said railroad and telegraph line, and upon the road-bed, rolling stock, depots, buildings, and other property used in operating and running complainant's said railroad, and have, from time to time, so levied and assessed and collected taxes from the complainant therefor. That at the first session of the legislative assembly of Wyoming territory, begun and held in the city of Cheyenne, on the twelfth day of October, A. D.

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1869, a bill was passed and became a law, entitled "An act to establish the boundary lines of Albany county and for the appointment of officers therein." That in and by said act the eastern boundary line of said Albany county, which adjoins said Laramie county on the west, was fixed at a point on complainant's said railroad, known as Buford station. That by virtue of said act the property of complainant in said territory has been, from time to time, assessed for the purposes of taxation by said Laramie county from the eastern boundary line of said territory to said Buford station, a distance of sixty-nine miles. And by said Albany county from said Buford station on the east, westwardly to the eastern boundary line of Carbon county, a distance of ninety-five and one half miles. That at the second session of the legislative assembly of the said territory, begun and held at Cheyenne, on the seventh day of November, A. D. 1871, a bill was passed and became a law, or so it was represented to complainant, entitled, "An act defining the boundaries of Laramie county." That in and by said act the western boundary of said Laramie county was fixed at a point on complainant's said railroad, known as the center of Dale Creek bridge, being a point on complainant's said line of railroad, about nine miles west of said Buford station. That the effect of the said law was to include within the limits of said Laramie county about seventy-eight miles of complainant's said railroad and telegraph line; and to reduce the length thereof in said Albany county to a corresponding distance, so that there remained in said county about eighty-six miles of complainant's said railroad and telegraph line. That when called upon to list its property for taxation in said counties of Laramie and Albany, for the year A. D. 1872, the complainant, relying upon the provisions of the said act of the second legislative assembly of Wyoming territory, entitled, "An act defining the boundaries of Laramie county," and believing that said act should govern its return to the assessors of said counties of Laramie and Albany, made

Statement of Facts.

its said return in accordance with the provisions of the said act, and returned as property subject to taxation in said Laramie county, the railroad and telegraph line of complainants, situated between said Buford station and the said center of Dale Creek bridge, together with the depots, wood stations, water stations, round house, proportionate value of rolling stock and other property therein, all being of the aggregate value of eighty-four thousand six hundred and fifty-nine dollars, and which said property theretofore had been returned for the purposes of taxation in said county of Albany.

That complainant, in making return of its property in said county of Albany, deducted from the aggregate value of its property, as returned to the assessor of said county, the valuation of said property situated between said Buford station and the said center of Dale Creek bridge, such property amounting to the valuation aforesaid. That some dispute having arisen between said counties of Laramie and Albany as to the rights of each under said law, passed at the session of the second legislative assembly of Wyoming territory, and it being claimed by said Albany county that said law was not legally and properly passed by said legislative assembly, and in consequence thereof that the said Buford station was still the eastern boundary line of said Albany county at its point of crossing complainant's said line of railroad, the board of the county commissioners of said county of Albany, acting as a board for the equalization of taxes in that county, proceeded to assess and did so assess said property, so as aforesaid mentioned, as being situated between said Buford station and said center of Dale Creek bridge as liable to assessment and taxation in the county of Albany, fixing the valuation at eighty-four thousand six hundred and forty-nine dollars, and levied a tax thereon of fifteen mills upon the dollar, the amount of said tax being one thousand two hundred and sixty-nine dollars and seventy-three cents.

That the board of county commissioners of the county of

Statement of Facts.

Laramie have levied upon said property a tax of twenty-six mills on the dollar, the amount of said tax being two thousand two hundred dollars and eighty-seven cents. That by reason of the premises the said property of complainant, situated between Buford station and the center of Dale creek bridge, and of the assessed valuation of eighty-four thousand six hundred and forty-nine dollars, was assessed for the purposes of taxation by both of said counties of Laramie and Albany. That the said T. Jeff. Carr, sheriff and *ex officio* collector of Laramie county and the said N. K. Boswell, sheriff and *ex officio* collector of Albany county, had each demanded of complainant the amount of the tax levied upon said before-mentioned property by their respective counties, and that each claimed the right to collect, and threatened to collect the same by levying upon and selling certain personal property of complainant necessary to the operation of said road, to the great manifest and irreparable injury of complainant.

The bill of complaint further sets forth that complainant was ignorant of the rights of the said counties and of the said collectors thereof in the premises, and had requested the said counties and their officers to take such action as should determine their rights in and to said disputed territory, and fix and determine the rights and liabilities of the complainant in paying the tax either to said county of Laramie or to said county of Albany, but that they had each wholly failed and refused so to do. That the complainant had no interest in the matter in controversy between the said defendants or the said counties; but by reason that they persisted in their several adverse claims, and that complainant was advised that it could not safely pay the same or any part thereof to either of them, though it was ready and willing to pay either of said amounts, viz., two thousand two hundred dollars and eighty-seven cents, or one thousand two hundred and sixty-nine dollars and seventy-three cents, into court to abide the judgment thereof. That the said defendants ought to interplead touching their respective rights

Statement of Facts.

in order that complainant might be informed to whom it should pay tax upon said property, and that they and each of them ought to be restrained by the order and injunction of the court from collecting or attempting to collect said taxes, or from commencing any suit in law or in equity, or prosecuting the same against complainant in respect to the matters aforesaid.

That complainant then prayed for relief in accordance with the foregoing statements and allegations, and a temporary injunction was granted by one of the justices of the supreme court, and presiding judge of the first district, at chambers. To the bill of complaint the defendant, Carr, filed a general demurrer.

The defendant, Boswell, filed an answer, in which, after admitting some of the formal allegations contained in the bill, denied that said complainant had acted in accordance with the provisions of the act of the second legislative assembly aforesaid, but alleged that it had fully returned to the assessor of the county of Albany the property mentioned and set forth in said bill of complaint as being situate between Buford station and the center of Dale creek bridge aforesaid.

The defendant, Boswell, in his answer, further states that it was alleged by said defendant Boswell, and by said Albany county, that said alleged law of 1871, was not legally and properly passed by said legislative assembly, and that the facts in relation to said act were as follows: that Hon. S. F. Nuckolls introduced into the council, Council File No. 15, entitled, "A bill for an act defining the boundaries of Laramie county, at a session of the second legislative assembly of Wyoming territory, begun and held in the city of Cheyenne on the seventh of November, 1871; that said bill No. 15 passed both houses of the legislative assembly on the fifth and sixth days of December; that it was presented to the governor of said territory for his approval and signature. That on the thirteenth of the same month, said bill was returned to the council by the governor, with his veto.

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That on the day following it was passed by the said council over the said veto, by a vote of seven "ayes" to two "nays," and was then sent to the house of representatives, and on motion was there put upon its passage "the veto of the governor to the contrary notwithstanding." Mr. Sheeks, the speaker, being present, was at his request excused from voting. The ayes and nays were then taken with the following result, ayes, seven; nays, three; absent, two; present but not voting, one. The speaker, Mr. Sheeks, announced the passage of the bill by a two-thirds vote, but said defendant alleged that the same had not been passed by a two-thirds vote, and that said bill never received the requisite majority; the announcement of the speaker to the contrary notwithstanding; that said bill or pretended act did not become a law of the territory of Wyoming, and that in consequence thereof the said Buford station still remained on the eastern boundary line of said county of Albany, at its point of crossing said complainant's line of railroad. To this answer complainant filed a general replication.

W. R. Steele, for complainant.

• *W. W. Corlett*, for defendant Carr.

C. W. Bramel, for defendant Boswell.

By the Court, KINGMAN, J. This case is brought before this court by an agreement of the parties in writing, in which it is stipulated that all the issues in this cause be heard, argued and determined, and that final order and decree be made and entered in said cause, etc. In order to expedite business and save expense to the parties, this court have consented to examine the various questions raised in the case, and to make a final disposition of them, in the same manner it would have done had the cause been tried on its merits in the district court, and regularly brought to this court by appeal.

We have already decided at the present term of this court,

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in the case of *Nash v. Brown*, that the act of the last legislature, by which it was proposed to change the boundary line between the counties of Laramie and Albany, was not legally passed over the veto of the governor, and therefore never became a law of this territory. This was the principal question involved in the present case, and must be decisive of them all, unless as is contended by the county of Laramie, the railroad company, in consequence of its negligence or mistake of the law, has estopped itself from setting up any defense that will protect it from paying the taxes assessed in both the defendants' counties. It is contended that our statutes have provided a tribunal in the county board of equalization, where this question should have been heard and where full and adequate justice might have been done, and as the plaintiff has neglected to apply these in due season he is now without remedy. We cannot see how the county board of equalization in either of the counties could have acted on the question involved in this case, or how the railroad company could have acted so as to avoid meeting this precise dilemma in one or the other of these counties. The emergency has not grown out of the action, or the want of action, on the part of this plaintiff, but is the necessary consequence of the assertion of a right to tax the same property in each of the defendants' counties. This is peculiarly a case for equitable cognizance, and one in which an order to interplead would seem to be the only adequate remedy; and upon such an order we are satisfied that the only result that could be reached would be a decree that the railroad company pay the tax as assessed in the county of Albany, and that the county of Laramie be perpetually enjoined from collecting or attempting to collect the tax assessed on that portion of the plaintiff's property situate in the county of Albany, and that each party pay its own costs.

And it is so decreed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
JULY TERM, 1873.

McGLINCHEY *v.* MORRISON.

EVIDENCE.—The best evidence which the nature of the case will admit of, and which can be obtained by the party, should be adduced.

IDEM.—Secondary evidence should never be admitted, except where it is impossible to procure testimony of a higher and better character.

IDEM.—A copy of an execution, under which goods have been levied upon, made from memory, although verified, is inadmissible.

APPEAL from the District Court for Sweetwater County.

The opinion contains a sufficient statement of the facts in this case.

W. W. Corlett, for appellant, made the following statements and citations: In this case there are but two errors assigned which it is necessary for the court to consider; for although the overruling of the defendant's motion for a new trial is assigned as an error of the court below, still, as the motion for a new trial is based solely upon errors of the court during the trial, it is only necessary to consider the two errors alleged to have occurred during the trial.

I. The error assigned is found on the twenty-seventh

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page of the transcript on file in this cause, and relates to the exclusion of the sworn copy of an execution offered in evidence by the defendant in the court below; upon this point reference is made to the following authorities: 1 Phil. on Ev. 489; 2 Phil. on Ev. chap. 5; 1 Greenl. on Ev. 628.

II. The second error assigned is found on the twenty-ninth page of the transcript filed herein, and relates to the instructions given by the court to the jury, in which the court charged the jury that there was no such evidence before the jury as would justify them in finding that the defendant took the goods under an execution. Upon this point reference is made to the following authorities: 1 Wait's Dig. 127; 4 E. D. Smith, 276; 47 Barb. 388, 501; 16 Johns. 348; 18 Id. 544; 20 Wend. 555; 1 Denio, 520; 3 Gra. & Wat. 768.

Amos Steck, for appellee.

By the Court, FISHER, C. J. (THOMAS, J., dissenting.) This was an action in replevin, brought by the plaintiff against the defendant, who was sheriff of Sweetwater county, to the June term, A. D. 1871. At the June term, A. D. 1872, the case was tried before Mr. Justice Carey, and a verdict rendered by the jury in favor of the plaintiff, finding the right to the possession of the property in him, and assessing his damages at twenty-five cents.

The only error complained of and relied upon by the defendant, who is the appellant, was to the charge of the court to the jury. The record of the evidence is that on the trial of the cause it was shown that a judgment had been obtained in Laramie county against one Luke Joice, upon which judgment an execution was placed in the hands of the defendant in this action, who proceeded to levy on the stock of goods in the possession of Joice; but that before the said levy was made the plaintiff gave notice to the sheriff that the said stock of goods belonged to him and not to

Joice. Upon the trial the defendant gave these and other matters in evidence and offered a copy of the alleged execution made out by himself from recollection, which was objected to by plaintiff's counsel and rejected by the court. After the evidence had been submitted and the cause argued by counsel, the court charged the jury as follows :

1. That "the plaintiff must recover on the strength of his own title."

2. "If the sale to Morrison was secret, and the goods remained in the possession of the vendor, the sale was void as to creditors."

3. That there was no such evidence before the jury that would justify them in finding that the defendant took the goods under an execution, as alleged in the defendant's answer.

To which third and last instruction the defendant then and there excepted, and assigned said instructions as error. We fail to discover any error in the instruction complained of. It is a well settled rule of evidence that a party must make out his case by the best evidence which can be had. In this case a certified copy of the record of the judgment, or at least of the execution (the judgment having been obtained and execution issued from Laramie county), would have been perhaps the best evidence, or a compared copy might possibly have been resorted to; but we cannot understand how it could be insisted upon that months after a levy had been made, and the execution returned, the sheriff could from memory make out a paper and swear that it was a copy of an execution upon which he had levied on a stock of goods and made his return.

The judgment is affirmed.

Argument for Plaintiff in Error.

WILSON v. THE FIRST NATIONAL BANK OF
CHEYENNE.

NATIONAL BANK STOCKHOLDER.—The stockholder of a national bank has legal capacity to sue such corporation for misappropriation of the stockholder's funds, and for other causes.

IDEM.—A corporation being a legal entity, as such, distinct from its members, incorporators, or stockholders, it follows that each or all of them may have grievances redressed by actions at law or proceedings in chancery, as any creditor not occupying that relation.

ERROR to the District Court for Laramie County.

This action was brought upon a petition containing the following allegations: 1. That the defendant was a corporation duly organized under the general banking act of congress and acts amendatory thereof; 2. That on February 21, 1871, at Cheyenne, the plaintiff delivered to the defendant five thousand dollars; 3. That in consideration thereof said defendant agreed with and promised plaintiff to appropriate the same to the payment of fifty per centum of one hundred shares of the capital stock of the said First National Bank of Cheyenne, for which said plaintiff had therefore subscribed as one of the shareholders of said banking corporation; 4. That the defendant failed to perform such agreement and diverted said five thousand dollars to other purposes, to plaintiff's damage of four thousand dollars, to recover which this action was brought.

To said complaint the defendant filed a demurrer, stating the following grounds: 1. That the plaintiff had not the legal capacity to sue; 2. That the petition did not state facts sufficient to constitute a cause of action.

Which demurrer was sustained by the district court of the first judicial district, at the November term, 1872, the cause now coming to this court on plaintiff's petition in error.

E. P. Johnson, for plaintiff in error.

The errors assigned are: 1. That the court erred in sus-

Argument for Plaintiff in Error.

taining the demurrer; 2. That the court erred in giving judgment against the plaintiff. Plaintiff claims:

I. That a corporation is a person in law with the same rights to sue and be sued as other persons, and stands on an equal footing with them, in respect to liability to respond in a civil action for damages for breach of contracts, and the commission of torts. The above proposition is considered fundamental and too well established to require the support of authorities.

II. That the act creating the defendant in this case, or under which it is organized, confers upon it no immunities and charges it with no liabilities other or greater than those recognized in the law generally applicable to corporations, although it does increase the liability of stockholders.

III. The corporation being a legal entity, as such distinct from its members, incorporators or stockholders, it follows that each or all of them may have grievances redressed by actions at law, or proceedings in chancery, as any creditor not occupying that relation: *Angell and Ames on Corp.* 413; *Smith v. Poor*, 40 Maine, 415; *French v. Fuller*, 23 Pick. 108; *Wilson v. Rogers*, Sup. Ct. Wyoming.

IV. While the banking act requires a portion of the capital stock to be paid in before it commences business, yet before such payment the bank is fully organized and in existence as a person in law, and as such it possessed no power to compel Wilson to pay his assessment, nor was Wilson under any legal obligation to do so; he might have refused to pay, and refused thereby to become a stockholder, and the bank would have been compelled to sell the stock to other parties at public auction. The payment by Wilson was therefore a sufficient consideration to support the contract in reference to the appropriation of the money. As it must be conceded that if the bank has any power over its own property it can contract with reference to the same.

V. Rights of action by or against a bank, are not incidents or appurtenances of the stock, and in no case would such rights of action for breach of contract or the right of a

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stockholder to receive damages therefor pass to another purchasing the stock.

VI. The question as to whether plaintiff was allowed to control his stock, and how or in what manner damages arose by reason of the alleged breach of contract are not pertinent to the issue in this case. So also the question as to whether a depositor must make demand before bringing suit.

W. R. Steele, for the defendant in error, contended for the points raised in defendant's demurrer.

By the COURT. There are but two questions to be considered in this case, and, as with all questions of demurrer, facts outside of the pleading cannot be regarded. We are of the opinion, in the first instance, that the fact of the plaintiff having subscribed to the capital stock of the First National Bank, defendant, did not debar him from bringing an action against the same for breach of contract, and that a stockholder certainly has the rights of action against a corporation that are possessed by a corporation against any of its stockholders; 2. We believe that the allegations contained in the plaintiff's petition are sufficient, if proved, to entitle said plaintiff to recover thereon.

The judgment of the court below is therefore reversed, with costs against the defendant, and twenty days are given defendant, from the filing of this opinion, to answer in the district court.

FISHER, C. J., dissenting: The opinion filed by the majority of this court, although styled *per curiam*, is so remarkable in its character that I cannot permit it to pass into the future without entering my solemn protest. I cannot permit its paternity to rest at my door, and therefore, without taking time to enlarge upon what I conceive to be its errors, simply give a very few reasons for dissenting. There are several reasons why the action of the district court, in sustaining the demurrer to plaintiff's petition, should have been affirmed:

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1. The petition does not set out the fact, if it be a fact, that the plaintiff was a stockholder at the time he brought his suit. If he was not, he had no cause of action, or, rather, he had not the legal capacity to sue. In the argument upon the demurrer, it was admitted that the stock referred to had been set aside to him, and became his property in accordance with the terms upon which he had paid over the money, that he had shortly afterwards sold the shares of stock thus purchased, and in so doing he transferred all the right thereto to the person to whom the stock was transferred.

2. The national banking law provides specific remedies for persons who have sustained losses by any national bank, hence he must seek his remedy in the manner thus provided.

3. If the plaintiff had sustained any loss by the misappropriation of his funds his remedy would lie against the directors, through whom the loss occurred, in the private capacity, and not against the bank, or even against the directors in their official position: See *Muse on Banking*, 450-452.

If this last position is correct, and I do not see how it can be successfully controverted, then the plaintiff had brought his action wrongfully, and the demurrer should have been and was properly sustained. One of the judges who rendered the opinion of the majority of the court admitted, during the argument, and announced his opinion accompanying the decision, that from his knowledge of the facts the plaintiff could not recover, not having the right of action, nevertheless he united with the other judge in reversing the action of the district court. To me this does not look consistent.

I content myself with entering upon the record this dissenting opinion, trusting to the future either to be sustained or not, as the case may be.

Argument for Plaintiff in Error.

KINSLER v. THE TERRITORY OF WYOMING.

CHALLENGING JURORS.—Where the statutes prescribe fully and distinctly the qualifications of jurors and the points upon which they may be interrogated by counsel, questions as to entirely different matters are not permissible.

SENTENCE.—Where a defendant under an indictment for felony has been irregularly sentenced, the proper course is to again pass sentence upon him in due form.

IDEM.—If the court fails to interrogate the prisoner, before passing sentence, as to whether he has anything to say why sentence should not be passed upon him, such failure furnishes no ground for a reversal of judgment, especially as the supreme court must impose the sentence *de novo*.

ERROR to the District Court for Laramie County.

The writ of error in this case was prosecuted by Toussaint Kinsler, the defendant below, to reverse the judgment of the district court of the first judicial district for the county of Laramie, at the November term, 1872, of such court, in a cause wherein the said Kinsler was indicted for murder in the first degree, for the killing of one Adolph Pinea, and at the same term of court, tried, found guilty as charged in the indictment and sentenced to suffer the extreme penalty of the law. The affidavit referred to in the brief of the plaintiff in error, is one made by his counsel to the effect that the plaintiff in error had not, before his trial, been served with a true copy of the indictment, as provided by the laws of the territory of Wyoming.

W. H. Miller, for plaintiff in error.

The first error assigned upon the record is, that the duly certified transcript of all the proceedings in said cause in the court below, shows that there were two different sentences imposed upon this plaintiff in error, and upon two different days; first, upon the fourth day of December, 1872, upon motion of the prosecuting attorney, sentence was pronounced by the court in the following words and figures:

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“The sentence of the court is, that you, the defendant Toussaint Kinsler, be taken hence to some secure place, until Thursday, the second day of January, A. D. 1873, and then to be hanged by the neck until you are dead.”

On the fifth day of December, 1872, the plaintiff in error was again brought before the court, and then and there another and a different sentence was imposed upon him, in words and figures as follows :

“The sentence of the court is, that you, Toussaint Kinsler, be taken hence to the prison whence you came, to be there kept in the custody of the sheriff of Laramie county, until the day of execution, and that on Thursday, the second day of January, A. D. 1873, within the walls of the prison of said county, or within an inclosure to be provided for the purpose, in accordance with the requirements of the laws of this territory, between the hours of twelve o'clock M. and two o'clock P. M. of said day, you be then and there hanged by the neck until you are dead.”

It is material that it should appear upon the record that the prisoner, under conviction by return of verdict of the jury, when the punishment is death, was, before receiving his sentence from the court, interrogated as to whether he had anything to say why judgment of death should not be pronounced on him. An omission is fatal: Bish. Crim. Proc. p. 865, sec. 865, and notes 4 and 5; Barb. Crim. Law, 370; *Safford v. People*, 4 Park. 470-479.

The record in this cause does not show that the plaintiff in error was thus interrogated at the time of passing sentence by the court, or at any time previous thereto, in either of the above-mentioned sentences.

The second error assigned upon the record is, that the court overruled the objection made by the attorney for the plaintiff in error, to the reading of the indictment in this cause to the jury, in the progress of the trial, because no copy of the indictment upon which the cause was being tried had been served upon Toussaint Kinsler, the defend-

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ant therein, as required by law, or in the manner required by law, referring to the record of affidavit of W. H. Miller, cites *Crim. Code of Wyoming Ter.*, secs. 97, 109.

The offense charged upon the plaintiff in error is a statutory one, hence in all the steps taken, or prescribed by the statute to be taken by the prosecution, in order to place the defendant in an indictment on trial, the law, as laid down in the statute, must be followed; and no defendant in a criminal cause can be called on by the court to answer or to be arraigned until the requirements of the law in such cases made and provided are complied with, and in all criminal proceedings everything is construed most favorably for the defendant and against the state: *Code Crim. Pro.* 483.

W. W. Corlett, for defendant in error.

Judgment of the district court affirmed, and the prisoner re-sentenced by the supreme court, in accordance with the provisions of the statutes of the territory of Wyoming.

WILSON v. THE TERRITORY OF WYOMING.

CONTEMPT.—At common law proceedings for contempt cannot be reviewed by a court of errors.

IDEM.—The legislature only can give a defendant in such proceedings the right to appeal or to a writ of error.

IDEM.—Where in such a case a writ of error was improperly sued out, a motion to dismiss the proceedings in error was sustained.

ERROR to the District Court for Laramie County.

This was a proceeding for contempt of court, instituted in the district court at the March term, A. D. 1873, against the defendant in the district court, now plaintiff in error, wherein he was charged with writing and publishing, in the "Omaha Daily Herald," a newspaper published at Omaha,

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Nebraska, but having circulation within the jurisdiction of said court, certain scandalous and contemptuous allegations, charges and expressions in reference to said district court and the judge thereof. After hearing and consideration of the matter, the plaintiff in error was adjudged guilty of contempt, and was fined in the sum of five hundred dollars, and ordered to be confined in the county jail of said county until such fine and the costs of the proceedings were paid. Afterwards, the plaintiff in error obtained leave to file a petition in error in the case in this court from the chief justice, upon which a summons in error was issued and served upon the attorney of record for the defendant in error. The attorney for the defendant in error then filed in this court the following motion :

“ In the supreme court, Posey S. Wilson, plaintiff in error, v. The Territory of Wyoming, defendant in error. Motion to dismiss the proceedings in error herein. And now comes the said territory of Wyoming by its attorney in this behalf, W. W. Corlett, and appearing specially and for the purpose of this motion only, moves the court now here to dismiss this cause and all the proceedings herein from this court, for the reasons : 1. That this court has no jurisdiction of the subject-matter of the proceedings in error or of the cause ; 2. Because this cause is not properly brought to this court, no writ of error having issued from this court, and for other reasons apparent from the record herein. The Territory of Wyoming, by W. W. Corlett, its attorney.”

W. W. Corlett, attorney for the motion.

A motion has been filed in this cause to dismiss this proceeding in error for want of jurisdiction. It therefore becomes important to first determine that question, because the objection is predicated upon considerations which preclude this court from taking jurisdiction under any circumstances ; in other words, the objection is of such a nature that no consent of parties can give jurisdiction. In the first place, no statute of this

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territory allows this proceeding in error to be prosecuted. The code of criminal procedure of this territory has reference only to ordinary criminal cases prosecuted by indictment, tried by a jury in the ordinary manner, and warrants or permits a proceeding in error and a bill of exceptions only in such cases. This is manifest from the entire criminal code, and more especially by reference to the following sections of the code of criminal procedure: Laws of Wyoming, A. D. 1869, to wit, 109-119, 128, 129, 141, 145, 181, 184, 188, 194, 195. But it is insisted that the plaintiff in error is entitled to this proceeding in error by virtue of the ninth section of the organic act of the territory. The language of the organic act is as follows:

“Writs of error, bills of exceptions and appeals shall be allowed in all cases from the final decision of said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in said court.”

What is the meaning of this language? Evidently not that writs of error, bills of exceptions and appeals shall be allowed in all cases as cumulative remedies for the review of cases; for such an interpretation would be absurd. Congress must be understood as having used these terms in the sense in which they were used at the common law, and by the word cases must be meant such cases as those several proceedings for review were applicable to at the common law. Now at the common law a writ of error would lie only in a common law case, possessing the ordinary incidents of a case; bills of exceptions did not lie in a criminal case at common law, and appeals were permitted and proper for the review of chancery cases. Hence, congress must have designed simply that these several remedies should be allowed only in such cases as were reviewable by these several methods respectively at the common law. As it can hardly be pretended that an appeal would lie in this case, and as a bill of exceptions has another office than that of

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presenting a case for review, in the sense of transferring the record from one court to another, we are constrained to believe that if a case can be brought here at all by virtue of said provision of the organic act, it must be by writ of error. The question then is, does a writ of error in such a case lie at common law? Did congress so intend in view of its language above cited: "But in no case removed to the supreme court shall trial by jury be allowed by said court?"

Upon the propositions above set forth, the following authorities are cited: Arch. Crim. Law, vol. 1, 723; *Ewing v. Hollister*, 7 Ohio, 138; 9 Ohio, 142-3; 1 Abb. U. S. Pr. 327, 337; 2 Abb. U. S. Pr. 213; 3 Black. Com. 406; 3 Whart. sec. 3049.

And it is further to be observed that if a writ of error will lie in such a case, since no regulation is made by the statutes of the territory as to the manner of allowing the writ in such a case as this, then the allowance of the writ and all its incidents must be according to the course of the common law; the proceedings in this case is not according to the course of the common law.

It having been agreed upon that this whole case should be considered at one hearing for convenience, the various errors assigned in the petition in error herein will be considered in their order; but with the distinct understanding however, that this course, in no respect, waives any objection to the jurisdiction of this court to review the case, and while the defendant in error does not object to an opinion of this court upon the merits of the case, yet it asks for no such opinion unless required to a decision of the same after adjudging the motion to dismiss to be overruled. The defendant in error also declines to consider any errors assigned by counsel in argument, brief or assignment of errors, unless the same were assigned in the petition in error. filed in this court by leave.

The first error assigned is, that the court erred in ordering an amended rule to be served on the then defendant, now plaintiff in error. In the first place it is to be observed

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that the said order was made upon the motion of the attorney for the plaintiff in error. Besides no exception was taken to said order, and the said order could in no manner prejudice the plaintiff in error.

The second error assigned is, that the court erred in overruling the motion of said Wilson to discharge the amended rule, and in making the rule absolute, and in ordering the attachment to issue. Upon this alleged error it is important to refer to the record, as the argument seems to be based largely upon a state of facts and premises which do not exist in fact. The record shows that before the said amended rule issued an affidavit was duly filed, setting forth the facts upon which the said rule did issue. Besides the motion to discharge said amended rule was overruled upon its own merits, and did not assign as reasons for discharging the amended rule many of the reasons now assigned in plaintiff in error's brief. Upon this alleged error it is argued that the judge of the court below should not have made the affidavit upon which the rule issued. No authority for this *ipse dixit* is cited, besides no objection of that nature was taken in the case below. As to the balance of the argument on this alleged error, it is submitted that the record shows a full compliance with all the requirements of the law.

The third error assigned is that the court erred in overruling the said Wilson's motion to suppress the interrogatories filed. As this is a question which must be determined solely upon authority, reference is made to the following: *United States v. Dodge*, 2 Gall. 313; *Thornton v. Davis*, 4 Cranch, 500; *Pitman's case*, 1 Curt. 186; *People v. Fea*, 2 Johns. 290; 4 Black. 285.

The fourth error assigned in the petition in error, is that the court erred in refusing to grant the motion of the said Wilson for a change of venue. In the brief and argument, as printed and furnished to the attorney for the territory, no allusion is made to this exception, and it is therefore inferred that said exception is not now relied on. Whether it be well taken or not depends upon a statutory provision

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so plain that even a wayfaring man need not err in the proper interpretation of the same: see *Laws of Wyoming*, 1869, p. 486, secs. 115-118.

The fifth and last exception is, that the court erred in giving judgment for the said territory, when it ought to have been given for the said Posey S. Wilson, according to the law of the land. This exception is a sort of an *omnium gatherum*, and might be held possibly to reach back to any errors of the court in the record, substantially enough to affect the final judgment, if proper exceptions were taken thereto at the time and the exception preserved. But as special assignments of the alleged errors occurring up to the time of judgment were made, it may be fairly presumed that the last exception does not include any proceeding prior to the judgment of the court pronounced upon the answers to the interrogatories.

In the written argument, it is admitted that it was an offense at common law to speak or write contemptuously of the court or judges. The principle here conceded is too well sustained by authority to derive any additional strength from the concession. But it is denied that this peculiar portion of the common law is in force in this country, and especially in this territory. Upon this point, reference is made to the ninth section of the organic act of Wyoming; also, as bearing upon the construction of this section, see case of *Dumphy v. Kleinsmith*, 11 Wall.; also, *Laws of Wyoming*, 292; 2 Bish. on Crim. Law, secs. 214-216; *People v. Fea*, 2 Johns. 290; *Republica v. Oswald*, 1 Dall. 319; *Bayard v. Passmore*, 3 Yeates, 438; *Hollingsworth v. Duance*, 3 Wall. 77, 102; *Bronson's case*, 12 Johns. 460; *People v. Freer*, 1 Cai. 485, 518; *The State v. Wilson & Sherman*, Chicago Legal News, 1872, p. 85. The doctrine of the preceding cases is so well established that legislation has been found necessary in every instance to abridge the power of the courts over the subject of contempt: *Dunlap's Laws of U. S.* 804; *Laws of Penn.* 1809.

This idea seems to have impressed itself upon the minds

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of the counsel for the plaintiff in error, who insist that by the laws of Wyoming the subject-matter of contempt is limited in this territory. Without conceding that the acts of contempt in the present case, or at least some of them, fall without the provisions of the statute, attention is in the first place directed to the fact that our statute does not contain any words of express limitation. In the case of *Dunham v. The State of Iowa*, 6 Clark, 246, under a similar statute, the court refused to say that such a statute would have the meaning here contended for. But it insisted that the legislature has no power to restrict the authority of a court to punish for contempt. The power of a court to punish for contempt is one of its essential attributes; without it a court would not be a court in the sense of being a co-ordinate branch of the government: *U. S. v. Hudson*, 7 Cranch, 32-4. Opinion by Justice Thornton, in the case cited in the Chicago Legal News, *supra*; 2 Bish. Cr. Law, 206, note.

If then the power to punish for contempt is essential to the very idea of a court of justice, understood as a co-ordinate branch of the government, it follows, by the most unerring principles of logical deduction, that any legislation which undertakes to limit this power is invalid and a nullity. But it is affirmed upon argument that the plaintiff, by his answers to the interrogatories, purged himself of the contempts, if any there were, by disclaiming any intentional contempt of the court or the judge in his official capacity. This view seems to be taken in ignorance of the well-settled and elementary doctrine of the law that a free, moral agent is conclusively presumed to intend the natural and probable consequences of his acts: 1 Greenleaf, 23; *State v. Wilson*, 2 Sherman; 1 Russell on Crimes, 658-660; 13 Wall. 335.

J. B. Brown and *T. J. Street*, for plaintiff in error, contended that, under the provisions of the organic act of the territory of Wyoming, such plaintiff was entitled to a writ

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of error, and that the proceedings in the district court were fatally irregular.

Motion granted, and judgment of the district court affirmed.

BRENNAN v. HEENAN.

CHARGE TO THE JURY.—VERDICT.—Courts will not interfere with the verdict, because such verdict does not accord with the exact views of the case taken by the court, of the preponderance of evidence, or that the court would have arrived at a different conclusion from that of the jury.

IDEM.—Even if an erroneous charge to the jury has been given, the verdict will not be disturbed if it clearly appears that no injustice has been done, or that the jury have not been misled thereby in the finding of such verdict.

APPEAL from the District Court of the First Judicial District for the County of Laramie.

This was an action brought by Heenan to recover judgment against Brennan in the district court of Laramie county, for money alleged to be due him for building a billiard hall in Cheyenne, under a contract with Brennan. A contract was made in writing between the parties, by which plaintiff bound himself to build a house according to its specifications. Subsequent to the making of the contract, and after work had been commenced under it, certain additions to the building were proposed by defendant in the district court, and the plaintiff claimed that that additional work was done by him at defendant's request, and that the same in all amounted to three thousand eight hundred dollars, or thereabouts, which defendant promised to pay. The defendant in his answer denied any indebtedness, and pleads payment; also a counter-claim of a bar bill; also a counter-claim for damages for the failure of defendant to complete the building in accordance with the specifications of his original contract. Defendant also in his answer denies that all the work done under the contract, as modified, was or

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dered by him, or that any of it was done by virtue of an express contract, and that the price of any of it was agreed upon beforehand. The testimony of the respective parties was introduced without objections, and the principal errors assigned in the supreme court relate almost exclusively to the charge of the district court, which was as follows as to the points in question :

“There are very few legal points involved in the consideration of this case ; * * * the evidence is very contradictory, amounting to such a conflict that I do not pretend to be able to reconcile it ; I therefore submit it to you with the remark, that if you cannot come to a conclusion as to the facts as given by the respective parties, that you will have to be governed by the weight of the testimony. It is a maxim of the law that the burden of proof rests upon the one who is supporting the affirmative of any given proposition ; that is, that before a plaintiff can recover he must make out at least a *prima facie* case.

“I am asked by the counsel for the plaintiff in this action to give you the following instructions : Where one party is indebted to another on several contracts or items of account, it is his right and privilege in making a payment to direct what application shall be made of the same with reference to the several items of indebtedness ; but where such appropriation is not made by the debtor at the time of payment, then the creditor can apply the money received to the payment of any portion of the indebtedness he may choose.

“This, gentlemen, is the law, provided the facts of the case are such as to render the instruction asked for applicable. But before the payment referred to can be applied to the payment upon the verbal contract, you must be satisfied that such a contract was made ; and then before it can be appropriated to the payment of the extra work it must be shown that the extra work had been completed, and that in consequence of that extra work the plaintiff had two separate and distinct accounts against defendant.

“I am further asked to instruct you, that under the origi-

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nal written contract between the plaintiff and defendant in this action, the plaintiff was bound to build the house according to plans and specifications therein contained within six weeks from the twenty-fifth of April, 1872; but the limitation as to time applied only to work specified in the contract, and to nothing more; and if the failure to finish the building within that time was caused or brought about by the act of the defendant in making additions to the building, or in any other way, he is himself responsible, and cannot recover damages for the delay, unless it shall appear that that delay was unreasonable under the modified arrangement."

The court further instructs the jury, "That the plaintiff was not bound to do any other work within six weeks from the twenty-fifth day of April, 1872, except that specified in the original written contract, without having first, upon a sufficient or good consideration, agreed so to do. Now, if there was such an amount of extra work that it would be impossible to complete the building within the time specified in the written contract, then the plaintiff would be released from the fulfillment of that portion of the written contract by operation of law, without any alteration of the written instrument.

"But it is for you to consider, under the evidence, whether this was so or not; you will bear in mind that the statements of the parties upon this point; the plaintiff claims that the extra work extended the time, while it is in evidence that the work was stopped for want of materials; and further, that the plaintiff told defendant after his, defendant's return from Chicago, that he, plaintiff, would have the building completed within the contract-time, notwithstanding the past delays. With regard to the extra work, you will recollect the conflicting testimony; plaintiff alleging that he was to have a definite sum for the cellar wall on the east and north sides of the building, and a reasonable allowance for the western wall and the enlargement of the cellar, while the defendant denies having made any definite

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bargain for any portion of the extra work, except under the contingency that Messrs. Ellis & Hullburt were to put up a building and use his wall, paying one half the cost thereof.

"You will also take into consideration the set-off, claimed by defendant, who alleges that the building does not correspond with the specifications mentioned in the contract in several particulars; that the building was not as high as it was to have been built; that the ceiling is not as high as agreed to, and that the roof was defective. If the defendant had refused to take the building off of the contractor's hands for these reasons, he might have been justified in such refusal; but, having accepted the building without any such objections, it is too late now to set them up. With regard to the insufficiency of the roof, it was the duty of the defendant to require the plaintiff to put the roof in proper condition at his, plaintiff's expense, and if he failed to do so, after being so requested, then the defendant would be justified in employing some one else to do it, and the plaintiff should pay the cost of such work. On the question of damages on account of delay, there is no fixed rule by which you can be governed. No doubt the defendant sustained damages by reason of the delay, but it will not do to fix these damages by the amount he subsequently received. This standard of damages would be too indefinite. I will therefore submit the case to you under the evidence, by which you must be governed, and you will have to try to arrive at your verdict from that source, if you can so reconcile the statements of the parties; and if you cannot, you will bear in mind what I have before stated—that you will find where the preponderance of evidence rests, and decide accordingly."

To all of which charge the defendant excepted, and also to the refusal of the court to give the following, which was drawn up and presented to the court by defendant's counsel: "That in this action no recovery can be had by the plaintiff for the reasonable value of the extra work alleged to have

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been performed in laying the foundation of the building in question deeper than it was to be, under the written contract given in evidence, and for enlarging the cellar; but if the plaintiff can recover for such extra work, he must recover according to the express agreement of the parties, and, if he recover at all, he must recover the price as to such extra work, fixed by the parties themselves. That the plaintiff in this action can recover nothing for the reasonable value of the work of enlarging the cellar, mentioned in the evidence before them, because there is no claim for such work in the amended petition, and no proof of the reasonable value of such work. That in this action the plaintiff cannot recover for the reasonable value of any of the extra work, alleged to have been performed by plaintiff for defendant, except for the platform and the extra wall adjoining Masten's cellar, because, as to the balance of the alleged extra work, there is no proof before you as to the value thereof."

W. W. Corlett, for appellant.

The first error assigned, and relied upon by the appellant, relates to the refusal of the court to charge the jury that as to the extra work of enlarging the cellar and laying additional foundation. The request to charge the jury on the point was, in substance, that no recovery could be had by plaintiff for such extra work, according to the reasonable value thereof, but that the recovery, if any could be had, must be the contract price, as fixed by the parties. The only testimony showing any authority whatever for doing that work is that of Heenan himself, and his testimony is that a fixed price, five hundred dollars, was agreed on for the work. It hardly needs any citation of authority to show that when parties by contract fix the price to be paid for services, that price as fixed must govern, and not the reasonable value.

The second error assigned is the refusal of the court to instruct the jury that no recovery in the action could be had

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for the reasonable value of the work of enlarging the cellar, for the reason that no claim for such work is made in the petition, and there is no proof of the value of the work.

The third error assigned is the refusal of the court to charge the jury that no recovery in the action can be had for the reasonable value of any of the extra work, except for the platform and the extra wall adjoining Masten's cellar. There was no evidence before the jury of the reasonable value of any other portion of the extra work. The five following errors assigned refer to the questions raised in the first three :

The eighth exception and error assigned refers to the charge as to the question of damages. This instruction clearly permits the jury to allow a reasonable sum for the enlargement of the cellar and portions of the foundation walls, and hence cannot but be erroneous, especially as the jury are allowed to give what from the evidence is right for all these things.

The ninth error assigned is that the jury were told in substance that if the defendant accepted the building he waived all claim for damages arising out of the imperfect construction of the building, and if the roof leaked he had no claim for damages until he first requested the plaintiff to repair the roof. A recurrence to the foundation of a right of action must satisfy any one that this instruction was error.

The tenth error assigned relates to that portion of the charge wherein the court asserts that on the question of damages for delay, there is no rule by which the jury can be governed.

It is respectfully submitted that for all actions for the breach of contract the measure of damages is a rule of law, to be given to the jury by the court, and as this was an action on breach of contract, the court clearly erred in informing the jury that there was no rule by which they should be governed : See Sedgwick on the Measure of Damages.

The eleventh and last error assigned, is the refusal of the

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court to sustain the motion for a new trial. Upon the question of the effect of erroneous instruction and refusal to instruct properly when requested, see 3 Graham & Waterman on New Trial, 768 *et seq.*; 7 B. Monro R. 193; 1 Pick. 206; 2 Pick. 655, 665. From these authorities I extract this as the rule when erroneous instructions have been given: "Though the verdict of the jury in the court below be in accordance with the opinion of the appellate court, yet if the former gave erroneous instructions to the jury as to the law, so that it is not entirely certain that justice has been done, the latter will grant a new trial:" Graham & Waterman, 768.

E. P. Johnson, for defendant in error, contended:

I. Courts in which cases are tried do not interfere with a verdict simply because it is not in accordance with their views of the weight of evidence, nor because they would have arrived at a different conclusion from that of the jury, but only when the verdict is so far unsupported by evidence as to lead to the conclusion that the jury acted from improper motives or misapprehension, and injustice has been done in consequence, it being the province of the jury to weigh the evidence: Nash's Plead. and Prac. 549; 3 Wat. on New Trials, 1231. So, also, where the judge who presided at the trial approves the verdict, and refuses to set it aside on the ground that it is not supported by evidence, appellate courts exercised the power with still greater reluctance and caution, and only in the clearest cases: 3 Wat. on New Trials, 1213-1215, 1230. While in many cases appellate courts have refused to exercise the power at all, even though it is clear that injustice has been done: 3 Wat. on N. T. 1229, 1230.

II. Although there be error in the charge of the judge, yet if it appears from the record that no injustice has been done by the verdict, and that the jury were not actually misled to the injury of the party, against whom they find the error in that case, will furnish no ground for disturbing the

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verdict, or reversing the judgment: 3 Wat. on N. T. 118, 717, 811.

III. It appears by the record that defendant in error, in his petition in the court below, alleged that he did the extra work at the request of the plaintiff in error; that the same was worth a certain sum, which plaintiff in error promised to pay. Whereas, in his testimony it appears that he did the work mentioned therein for a price agreed upon in advance with the exception of the platform. Plaintiff in error claims a variance between pleadings and proofs, or that the pleadings were unsupported by the testimony, and strenuously urged his objections to the instructions to the court below, and the refusal to give those requested by him, on the motion for a new trial, and many of the errors complained of grow out of the alleged discrepancy between proof and pleading. A variance is not material, unless it have actually misled the adverse party to his prejudice, and when prejudice is alleged it must be proven to the satisfaction of the court before it becomes necessary for the court to even order an amendment: Code of Proc. secs. 142, 143.

It will be seen that no effort was made to offer that proof to the court, and as a consequence the plaintiff in error had no standing on a motion for a new trial, so far as any objection growing out of that matter was concerned. But even if he had then offered to prove that he was misled to his prejudice, it came too late, for having failed to take advantage of it on the trial where amendment could be made, and the case proceed, he cannot afterwards do so: Nash Plead. and Prac. 120; 3 Hill. 237; 5 Wend. 301; 15 Johnson, 210; 17 Wend. 71. But the variance being an immaterial one or not proven to be otherwise, may be disregarded and the fact found according to the proof: Seney's Code, 174-5; Voorhies' Code, 339, 340, 341 and 342; and disregarding the variance is equivalent to amendment, or the amendment may be made on an appeal: *Coleman v. Playstead*, 36 Barb. 29. In the case of *Fort v. Gooding*, 9 Barb. 371, which is a case in point presenting the same phase as the one at bar,

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it was held that evidence of a special agreement is admissible in an action by a daughter against her father for wages, although plaintiff claimed to recover upon an implied agreement only, defendant not having been misled; and ample reason to justify the holding in the above case is found in the law as expounded in *Chitty on Cont.* 17.

IV. The plaintiff in error in his answer below claimed damages for failure of defendant in error to complete the building in the time specified in the original contract. Whereas defendant in error claimed in his testimony that, by reason of the change of plan and the extra work required by the plaintiff in error himself, it was impossible to complete the building in that time, and also that the modification of the original contract necessarily worked an enlargement of the time. It has been held that a parol modification of a written contract makes it all parol: 2 Watts, 451-456, 457. And where the subsequent parol modification is based upon a consideration, suit should be brought on the contract as modified. As the written contract is in that case considered incorporated with it (the parol): *Chitty on Cont.* 115, note a.

At any rate it is unquestionably the right of parties to a contract to make a subsequent contract (and this without regard to kind, whether either are under seal or parol, or both: *Chitty on Contracts*, 116, note) that will either in express terms, or by necessary implication, enlarge a contract, modify or altogether vacate it: *Chitty on Con.* 115; 2 Par. on Con. 47, 48, 49, 554. And in all cases whatever, a promisor will be discharged from all liability when the non-performance of his obligation is caused by the consent, act or fault of the other contracting party: 2 Par. on Con. 676, note 9; *Cutter v. Powell*, 2 Smith Lead. Cases, 47, 48, 49, subdivision 4; 3 Hill, 129; 9 N. Y. 93; 4 Cowen, 564.

By the Court, CAREY, J. This cause was tried at March term, 1873, on an amended petition, answer and reply. The amended petition alleges that James Brennan, defendant (appellant in this court), is indebted to William Heenan,

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plaintiff (appellee in this court), in the sum of three thousand two hundred and fifty dollars, on a certain contract for the erection of a building in the city of Cheyenne. And also in the sum of five hundred and eighty-five dollars and fifty cents for extra work in and about said building, performed and done at the instance and request of appellant.

The answer of defendant admits the execution of the contract, and admits the claim for a portion of the extra work, but pleads an offset upon an account for two hundred and eighty-five dollars and twenty-five cents, and a counterclaim for alleged breaches of the contract, and also alleges payment of all moneys due plaintiff. The reply is a general denial.

The jury that tried the case found for the plaintiff (appellee in this court) and assessed his damage at four hundred dollars. A motion was made to set aside the verdict and for a new trial, alleging the following reasons why the verdict should be set aside and a new trial granted, viz: That the assessment of damages by the jury was excessive; that the verdict was not sustained by sufficient evidence; that the verdict was contrary to law; that the court erred in its instructions to the jury; and that the court erred in refusing to instruct the jury as requested.

The court, after argument, overruled the motion.

We are satisfied, from the examination of the entire record in this case, that no injustice was done the appellant by the verdict given by the jury in the court below.

Judgment affirmed.

HAMILTON v. THE TERRITORY OF WYOMING.

VERDICT.—Under the statutes of Wyoming territory, for the year 1869, and in force in 1872 and 1873, it was the duty of the jury in criminal cases where a verdict of guilty was found, and not of the court, to fix the term of imprisonment or to assess the amount of fine.

IDEM.—This rule applied to misdemeanors as well as to felonies.

CHANGE OF VENUE.—It is the duty of the district court, upon the trial of a criminal cause, where the proper affidavit as to the bias or prejudice of the judge is filed in time, to call in another judge to preside at such trial. The statute in reference thereto is mandatory and imperative, and upon an application properly made, it is error for the court to refuse, and such error is sufficient to obtain a reversal of the judgment.

ERROR to the First Judicial District Court for Laramie County.

A sufficient statement of the case is contained in the opinion which follows.

W. R. Steele, for plaintiff in error.

This petition in error is prosecuted by Ida Hamilton, the defendant below, to reverse the judgment of the district court of the first judicial district, within and for the county of Laramie, at the March term, A. D. 1873, in a cause wherein the said Ida Hamilton was indicted for keeping and maintaining a lewd house, for the practice of fornication, under which she was tried, found guilty and sentenced to an imprisonment of four months, in the jail of Laramie county.

The first error assigned upon the record is, that the court erred in refusing to sustain and allow the motion of the defendant below for a change of judge. The right to change the judge is an absolute right of a defendant in a criminal case, guaranteed by law: Sec. 115, Code of Crim. Proc.; Laws of Wyoming, A. D. 1869, 486. There is no discretion allowed in such a case, but the change "shall be allowed." And there is reason and justice in not allowing the judge discretion in such case. The statute of Indiana, in reference to criminal practice, contains a somewhat similar pro-

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vision—providing that a change *may* be allowed on account of the prejudice of the judge : Secs. 76, 77, Criminal Pleadings and Practice ; 2 Stat. of Ind. 466 ; Bick. Crim. Prac. 231. Under this statutory provision, the supreme court of Indiana has held that, upon such affidavit of prejudice being filed, a change must be allowed : Bick. Crim. Prac. 231-2 ; *Seyner v. State*, 8 Ind. 496 ; *Witter v. Taylor*, 7 Id. 110 ; *Golsby v. State*, 18 Id. 147.

On this first assignment of error we confidently ask that the judgment of the court below should be reversed, as being a fatal error invalidating every after step in the cause. The jurisdiction of the several courts herein provided for, both appellate and original, * * * shall be as limited by law, * * * and shall possess chancery, as well as common law jurisdiction for redress of all wrongs, etc. : Organic Act, sec. 9.

The seventh error assigned is, that the court below erred in refusing to allow the jury to fix the defendant's punishment in case they should find a verdict of guilty. This is made the province of the jury by the laws of this territory : Laws of Wyoming, 1871, p. 77, sec. 1 ; Id. 1869, p. 145, sec. 150 ; Organic Act, sec. 9 ; Const. of Ind. sec. 1, art. 7 ; 1 Stats. of Ind. 46 ; Laws of Crim. Prac. sec. 116 ; 2 Stats. of Ind. 419. The constitutionality of this act has never been questioned in Indiana, but has been incidentally affirmed in *Rice v. State*, 9 Ind. 532.

The constitution of Missouri and its laws of criminal procedure are the same, and the constitutionality of the law has never been questioned in that state. The law is the same in Iowa : *Cook v. United States*, 1 G. Greene, Iowa, 56. It was held that when the statute authorized the jury to assess the fine, and it failed to do so, that the court had no authority to assess the fine ; yet the constitution of Iowa vests in certain specified courts the judicial power, and when Iowa was a territory, an act was passed allowing juries to assess the amount of punishment for crime, the legality or constitutionality of which was never questioned, but tac-

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itly affirmed in *Cropper v. United States*, Morris' Iowa R. 342. As to authority of territorial legislature, see *Clinton v. Englebrecht*, 13 Wall. 434.

W. W. Corlett, for the defendant in error, cited Laws of Wyoming, 1869, p. 486, sec. 115; Voorhies' N. Y. Code, 121-123; 1 Greenl. on Ev. sec. 461; 3 Gra. & Wat. on New Trials, c. 10; 4 Wend. 483; 8 Id. 109; Organic Act Wyoming Ter. sec. 9; Laws of Wyoming, 1869, 484; 2 Bish. Crim. Pro. secs. 276, 285, 359, 941; Laws of Wyoming, 1869, 500; Hill. on New Trials, 479, 480, 481, 596; 22 Ill. 91; 6 Wise. 350; *Dunphy v. Kliensmith*, 11 Wall.

By the Court, CAREY, J. The plaintiff in error, at the March term, 1873, of the district court, in and for the county of Laramie, first judicial district, was indicted, tried and convicted of "keeping a lewd house for the practice of fornication." After motion for new trial was made, argued and overruled, the plaintiff in error was sentenced by the court to an imprisonment in the county jail for the period of four months. The plaintiff in error sued out a writ of error to reverse judgment of the district court, which said writ of error on account of irregularity, was, on motion dismissed. Thereafter at this term, the plaintiff in error filed a motion for leave to file a petition in error, which said motion was allowed; Associate Justice Carey dissenting. Thereafter the defendant in error filed a motion to dismiss the petition in error, which motion was overruled; Associate Justice Carey dissenting.

One of the errors assigned in the petition in error is, that the district court erred in refusing to grant the motion of defendant (plaintiff in error) for a change of judge on trial of said cause, after an affidavit had been filed alleging the prejudice of the judge of said court in said cause.

Section nine of the organic act provides that the territory of Wyoming shall be divided into three judicial districts, and that a district court shall be held in each of said districts by one of the justices of the supreme court, at such

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time and place as may be prescribed by law ; and said judges after their appointments, shall reside in the districts which shall be assigned them. Section fifteen of the same act provides, that temporarily, and until otherwise provided by law, the governor of said territory may assign the judges, etc., but the legislative assembly at their first, or any subsequent session, may assign the judges, etc. It is clear from the foregoing provisions of the organic act, that either of the justices of the supreme court is authorized to hold a district court in either of the defined judicial districts, and that temporarily, and until otherwise provided by law, or until the legislative assembly should assign the judges, the governor of the territory should make such assignments, and that it would be competent for the legislative assembly either by law to provide for the assignment of judges, or by law to directly assign the judges to the several districts.

Section 115 of the code of criminal procedure of the territory, provides that all criminal cases shall be tried in the county where the offense was committed, unless it shall appear to the court, by affidavits, that a fair and impartial trial cannot be had therein for any cause, in which case the court may direct the person accused to be tried in some adjoining district, where the cause alleged for removal does not exist. If the affidavit shall allege the prejudice of the judge as a ground of removal, the change of venue shall be allowed, and the case go to another district ; provided that if the objection be made to the judge only, the court may, for the convenience of parties, request the judge of another district to try said cause in the county in which such action may be pending.

The foregoing provision of law means simply this, that if it appears to the court, by affidavit, that a fair and impartial trial cannot be had in the county where it is alleged the crime was committed, the court may direct a change of venue, but if an affidavit shall be made, alleging the prejudice of the judge, a change of district *shall, not may*, be allowed ; provided that if the objection be to the judge only, the court

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may, for the convenience of parties, request the judge of another district to try the cause in the county where pending. While we may deprecate the existence of a law which permits a person accused of crime to impeach the impartiality or integrity of a county or judge, yet we can see nothing in the law in conflict with the law organizing the territory.

Juries and judges should be impartial, but to determine their partiality we think the law should require something more than the affidavit of an accused party. The courts are not arbitrators, nor are they responsible for the defects of the law, they are only bound to interpret and declare what the law is.

The legislative assembly in providing for a change of a judge, has a precedent in the law of congress of third of March, 1863, which provides that whenever the judge of the supreme court for any circuit, from his having been of counsel or being interested in any cause pending in such circuit court, or from any other cause, shall deem it advisable that the circuit court shall be holden by the judge of any other circuit, he may request in writing the judge of any other circuit to hold the court in such circuit. The law of congress leaves it with the judge to say whether there shall be a change of judge; the law of the territory says that it shall be determined on an affidavit. As the law now stands upon the statute book of this territory, whenever in any criminal case an affidavit is filed alleging the prejudice of the judge, it is the duty of the court to allow a change of district, or to request a judge of another district to try the case in the county where pending, the judge so requested becomes the assigned judge to try the cause. The only other error alleged in petition in error, which we deem it necessary to consider, is as follows:

“That the district court erred in refusing to allow the jury to affix the penalty to be assessed against and inflicted upon the said Ida Hamilton, in case the said jury should find the said Ida Hamilton guilty of the offenses charged in

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said indictment.” * * * The statute, section 114, act defining crimes, laws of 1869, under which plaintiff in error was indicted, tried and convicted, fixes the punishment at not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months. Section 169 of same act provides that when the punishment for any crime is discretionary as to the amount or extent, the court may determine the same. The statute of sixteenth of December, 1871, amended the last named section by inserting the word “jury” for that of “court.”

In the trial of this case in the district court, the judge expressly refused to instruct the jury that they should, if they found the defendant (plaintiff in error) guilty, determine the amount and extent of punishment under the statute, the court holding that the fixing or determining the amount of punishment is a judicial power, and could not be exercised by a jury. The organic act of the territory provides that the judicial power of the territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The act also provides how the supreme and district courts shall be constituted. No one will contend for a moment that it was not the intention of congress that there should be jury trials in the district courts. This question is settled by the language of the organic act, as also by several decisions of the supreme court of the United States. The jury are the judges of the facts, and in the trial of cases by jury become as important a part of the district court as the judge himself. The judicial power of the territory is not vested in the justice of the supreme court, but in the supreme and district courts and certain inferior courts, and a jury in the trial of a cause in the district court must necessarily exercise a part of the judicial power; they are judges of the facts, and must determine them from the evidence. The word judge means a public officer, lawfully appointed to decide litigated questions according to law. “This, in its more extensive sense, includes all officers who are appointed to decide such ques-

Points decided.

tions ; and not only judges, properly so called, but also justices of the peace and juries, who are the judges of the facts in issue :” 4 Dall. 229, and 3 Yates R. 300. The object of discretionary punishments is, that the punishment may in each case be proportioned so as to do justice. Two persons may each commit the same offense, yet one be deserving of more punishment than the other, and it has been found wise for the law-makers to make discretionary punishments. The rule has generally been to leave the punishment in such cases to the discretion of the judges, yet we can see no reason why this discretion should not be left to the jury ; a discretion which should in every instance be founded on the evidence and the peculiar circumstances of the case. In several of the states this discretion has been left with the juries, and nowhere does the constitutionality of the provision appear to have been questioned ; and by comparison of the constitutions of these states with the organic act, we can find no material difference as to where shall be vested the judicial power.

Judgment reversed ; case remanded for a new trial.

COUNTY COMMISSIONERS OF THE COUNTY OF LARAMIE *v.* COUNTY COMMISSIONERS OF THE COUNTY OF ALBANY AND COUNTY COMMISSIONERS OF THE COUNTY OF CARBON.

*CONTRIBUTION—COUNTY LIABILITIES.—The rule is well established, that where a county has been divided by an act of the legislature, one portion thereof retaining the former name, county seat, buildings and organization, and all county property, that such county is responsible for the entire indebtedness of the former county at the time of such division, and that an action will not lie against the new counties for contributions, unless special provision is made therefor by the legislature in the act itself.

IDEM.—Where the legislature of Wyoming territory organized two new counties, and included within their limits a part of the territory of

*Affirmed by the Supreme Court of the United States : See 2 Otto R 307.

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an existing county, but made no provision for apportioning debts or liabilities: *Held*, that the old county, being solely responsible for the debts and liabilities it had previously incurred, had, on discharging them, no claim upon the new counties for contribution.

APPEAL from the judgment and decree of the First Judicial District for Laramie County.

An act was passed by the legislative assembly of the territory of Dakotah, and approved January 9, 1867, by the governor of said territory, to create and organize the county of Laramie, and subsequently said legislative assembly passed an act to reorganize said county of Laramie, which act was approved by the governor of Dakotah on the third day of January, 1868. Said county, as reorganized, comprised that portion of said territory which now forms the counties of Laramie, Albany and Carbon, in the territory of Wyoming. By the last-named act the city of Cheyenne, in the present county of Laramie, was designated as the county seat. At the time of such reorganization, for several months after, and until December 16, 1868, the Union Pacific R. R. Co. was constructing its road and telegraph line through the southern part of said county of Laramie, for a distance of about two hundred and sixty miles, from the eastern to the western limits thereof. And said company erected along the line of said railroad a large number of valuable buildings, including depots, warehouses, telegraph stations, station-houses, hotels, round-houses, engine-houses and work shops, estimated, in said complaint, at the value of five hundred thousand dollars, the like estimate of the value of such railroad in Laramie county being one million six hundred thousand dollars. The complainant further alleges that, during the spring and summer of 1868, a number of towns and villages were built along the line of said railroad, and that the value of permanent improvements, during the time last-mentioned, was at least two hundred and fifty thousand dollars; and that, at the time of the reorganization of said county, as aforesaid, the aggregate value of permanent improvements in the towns of Cheyenne,

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Sherman and Dale Creek, in said county of Laramie, was not less than five hundred thousand dollars. It is further alleged that, in the summer of 1868, large herds of cattle, of the estimated value of seventy-five thousand dollars, were brought upon Laramie plains, now in Albany county, and that the same have since been increasing in numbers and value; and that, at about the same time, coal mines of considerable value were discovered and worked in what is now Carbon county; and that, on the sixteenth day of December, 1868, the value of the property of a permanent nature, in the entire county of Laramie, was of the value of three million dollars, subject to assessment. It is further shown that the persons named as officers in the act organizing Laramie county, failed to qualify, and by reason thereof the interests and affairs of said county were neglected until January, 1868, when the officers named in the act reorganizing said county, qualified and entered upon the discharge of the duties of their respective offices, until their successors were duly elected and qualified.

The complainant also states that at the time of the construction of the Union Pacific Railroad, in addition to the workmen and other employees of said company, who came within the limits of Laramie county for the purpose of constructing said railroad and the buildings and telegraph lines of said company, a great many felons and other criminals infested the entire country through which the railroad was then being built, committing a large number of crimes and depredations, thereby rendering the employment of numerous peace officers necessary, which, in addition to court, hospital and other expenses arising therefrom, made a heavy expenditure necessary by said county. Which expense, with the salaries, fees and disbursements of the county officers for the year 1868 were, it is claimed, subsequently paid by that portion of the county only which now forms Laramie county, except the sum of twelve thousand dollars assessed upon and paid in 1868 by the entire county as originally organized. It is further claimed by the plaintiff

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that the full amount of such expenditure was about forty thousand dollars, leaving a balance of twenty-eight thousand dollars for a contribution, towards the payment of which last named sum by the counties of Albany and Carbon, this action is brought. It is further shown by the acts of the Dacotah legislature, above referred to, that no provisions were made by the same for the payment of such indebtedness.

To the bill of complaint both of the defendants severally demurred, for the reason: "That the said complainant did not, in and by its said bill, make or state such a case as did or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against the defendants," which said demurrers were sustained by the district court, and an appeal is brought to this court from such decision.

McLaughlin and Steele, for the plaintiffs, cite: Laws of Wyoming, 1869, 146; Laws of Dacotah, 1868; Laws of Wyoming 1869, 707; 2 Kent, 331, 332, 333; Cooley's Const. Lim. 488, 504; Vattel's Law of Nations,—; 21 Penn. St. 107; Morford & Unger, 8 Iowa (Clark), 82; Angel & Ames on Corp. 1 to 20; Dillon on Mun. Corp. 30, 42, 55; Dillon's Cir Ct. Rep. 130; 5 Ohio St. 496; 8 Iowa, 92; 3 Iowa, 604; 1 Story's Eq. Juris. secs. 64, 469 to 505; 10 Mass. 384; 2 Searg. & Rawle, 117; 27 Penn. 107.

Corlett and Bramel, for the defendants, cite: 16 Mass. 76; 52 Penn. 374; 4 Mass. 390; 31 N. Y. 164; 2 Wend. (N. Y.) 109; 11 Ohio, 96; 6 Cush. 575-578; 15 Mass. 197; 8 Iowa, 82; 16 Mass. 16; Cooley's Const. Lim. 189 *et seq.*; *Id.* 488; 16 Mass. 76; 12 La. 515; Dillon on Mun. Corp. secs. 30 *et seq.*; 3 How. 534; 8 Ohio St. 285; 10 How. 511-541; 4 Gray, 250.

By the Court, THOMAS J. The rule appears to be well established, that upon the state of facts set forth in the complainant's bill, where a county has been divided by an act of a legislature, one portion thereof retaining the former name, county-seat, county organization, county buildings,

and all other county property, and the other portion being formed into new counties, that the county retaining such name and organization is responsible and liable solely for the entire indebtedness of the county at the time of such division, and cannot bring an action for contribution against the counties so set off, unless especially authorized so to do by an act or provision of the legislature making such division. That such legislature is empowered to make a division upon such terms and conditions in reference to the payment of any indebtedness then accrued as it may deem proper, and that even a court of equity cannot interfere in the matter, except in the case of a special provision as above mentioned.

I am further of the opinion that even if the foregoing rule did not hold good, the defendant herein can have no relief in chancery. From the very nature and condition of affairs set forth in the complaint, it appears that it would be impossible to obtain equitable relief, or that a court or master in chancery could arrive at any just computation of the amount that would be due from the defendants, or either of them, to the complainant. It appears from the complaint that quite a portion of the original indebtedness has been paid by taxes assessed upon the western portion of the former county of Laramie; but it does not appear, from the showing of the complaint, that it is in the power of the complainant, or that there are any means whatever to prove either the just proportion of the taxes already paid by the counties of Albany and Carbon, or the amount of property existing in December, 1868, in that portion of Laramie county now forming Albany and Carbon. On the contrary, it rather appears, by the statements of the complainant, that from the vague and indefinite condition in which the affairs of Laramie county then were, and the property contained therein has since continued to be, that an equitable adjudication of the case could not be obtained. It appears that the western portion of the county had, up to December, 1868, paid their taxes according to the assessments

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then made by the officers of Laramie county, and it is to be presumed that such assessments were correct—at least far more so than any which could be arrived at at this late day.

The complaint states that during the year 1868 the officers of Laramie county had qualified, entered upon and were discharging the duties of their offices, and the inference certainly is that they performed their duties in a just and equitable manner; that the assessment for that year was as correct^d as could under the circumstances be made, and that the amount of taxes then paid by that portion of said county, now forming Albany and Carbon, was the equitable proportion of those counties. If equity is to be administered it should certainly be administered strictly, and while it cannot be denied that any one bringing taxable property into or settling within a county, becomes to an extent responsible for its liabilities, yet in the inchoate condition of affairs in Laramie county, in December, 1868, and from the continual change which has since then taken place in property and the ownership thereof, in the counties of Albany and Carbon, I am unable to perceive that it would be any more equitable to compel the present inhabitants of these last named counties to contribute to the former indebtedness of Laramie county, and from which indebtedness the greater portion of such present inhabitants derived no benefit, whatever, than to leave said indebtedness as it now is, already paid by the inhabitants of Laramie county, who certainly derived by far the greatest advantages from the above mentioned expenditure, and paid some time since by those inhabitants of Laramie county, who had apparently a more direct interest in the affairs of Laramie county when such indebtedness accrued than either the present inhabitants and property owners of Laramie county, or of Albany and Carbon counties. While it is true that the three separate quasi corporations, parties to this suit, have since continued the same, it is equally certain that the inhabitants, property, and property owners thereof, have greatly changed,

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and in a matter of right or equity I think we should regard the real justice in the case.

The decision of the district court therefore, sustaining the demurrers of the defendants, is approved, and such decision is affirmed.

MARTIN v. THE UNION PACIFIC RAILROAD CO.

EVIDENCE—CUSTOM—USAGE.—The general custom or rules of a railroad company, or of various companies, cannot affect a special contract or modify the same, where such contract contains no ambiguity of terms.

IDEM.—Neither is proof of such general custom or usage permissible, unless it is also shown that such has been so in the dealings of such companies with outside parties, they understanding and consenting thereto.

IDEM.—It must be a general usage between the company and those who contract with it.

IDEM.—While the freight books of a company may be used to refresh the memory of a witness who has made entries in them, such books in themselves are no evidence, and were properly excluded.

APPEAL from the District Court for Laramie County.

A sufficient statement of this case is contained in the opinion.

W. R. Steele, for appellant.

This appeal is prosecuted to reverse the judgment of the court below, rendered at the March term, A. D. 1873.

The first error assigned is in rejecting the evidence offered by defendant to show by the witness, E. P. Vining, that there was a general rule on all the railroads of the United States as to the time special rate contracts should expire. This was an offer to prove the usage in the particular business and was competent: 1 Greenl. on Ev. 292-4; Red. on Carriers, 173; 2 Red. on Railways, 135; *St. John et al. v. Van Santvoord*, 25 Wend. 660; *St. John v. Van Santvoord*, 6 Hill, 157.

Second error: refusal to allow McKay to testify from the freight books: 1 Greenl. on Ev. sec. 117 *et seq.* Error

Argument for Appellee.

in neglecting to charge as to right of possession : Code of Proc. sec. 186, p. 540 ; Seney's Code, 198. Error in refusing to charge the jury as requested in reference to the custom as to the expiration of special freight rates : 1 Greenl. on Ev. secs. 292, 294 ; Red. on Carriers, 173 ; 2 Red. on Railways, 135 ; *St. John v. Van Santvoord*, 6 Hill, 157.

W. R. Corlett, for appellee.

The appellee, in answer to the first assignment of error, insists that the ruling of the court was correct, for two reasons :

I. That the evidence excluded was irrelevant, as the said Vining testified that he made the contract in question with appellee, and that by its express terms it was to expire on the first day of December of the current year.

II. Because the evidence offered would have tended to overthrow the contracts as set up by both parties ; and it may be added that the offer was not to prove a general custom or usage, but a general rule of the railroads of the United States. Custom or usage means the practice of both parties to contracts, not simply the rule of one of the parties : 2 Par. on Con. 535, 547 ; 1 Greenl. on Ev. secs. 49 to 56. As to the second error complained of, an examination of the record will disclose the fact that no proper foundation was laid for the introduction of the books, and the witness McKay was simply asked, not to state a fact within his own knowledge or as to the character of the books, but as to what the books contained or showed. On this point see *Laws of Wyoming*, 1869, p. 574, sec. 343 ; 1 Greenl. on Ev. sec. 115 to 121. As to the third assignment of error herein, it is to be remarked, first, that the assignment does not correspond with the record. The exception in the record being only to a portion of the instructions of the court. Hence the alleged error complained of and excepted to in the trial appears to be abandoned in the assignment of errors in this court, and a new error assigned here which was not saved by exception in the court below. Upon the error assigned,

to wit, the charge of the court, however, the appellee refers to 4 Wend. 483; 3 Wend. 109; 3 Gra. & Wat. chap. 10. As to the fourth error assigned, the exception being to the refusal of the judge to give several propositions together, and some of them being erroneous and inapplicable to the case, the refusal was right, though some of the propositions asked for may have been correct: 3 Graham & Waterman, 717, 718.

By the Court, FISHER, C. J. This was an action in replevin, brought by John H. Martin for the recovery of damages for the alleged wrongful detention of thirty carloads of hay from McPherson Station, and from a siding at Gaumett, in the state of Nebraska to Cheyenne, and Camp Carling, in the territory of Wyoming, to fill a contract for the United States; under an alleged special contract entered into with and between the parties to this action. Under the terms of the special contract, the defendant undertook to furnish cars to the plaintiff, at rates much less than the schedule rates, as published in the ordinary course of their business. The evidence on the part of the plaintiff below is, that on the tenth of September, 1871, he submitted to the freight agent of the defendant below, an interrogatory written with a lead pencil in the following words:

“ E. P. Vining, G. F. A.: How much per car-load will you charge me for three hundred ears of hay from McPherson and Julesburg to Cheyenne? Fifty cars of grain from Omaha, Fremont and G. Island to Cheyenne; fifty cars of flour from Omaha to Cheyenne, and one hundred and seventy-five cars of wood from Sherman to Cheyenne. J. H. Martin.”

“ After I submitted this proposition to Mr. Vining we had some talk, and he made me this answer:”

“ Hay, McPherson to Cheyenne, large cars, \$46; small, do., \$32; Julesburg to Cheyenne, large cars, \$40; small cars, \$30; grain and flour, Omaha, Fremont and G. Island to Cheyenne, \$70, cars, car-loads not to exceed 20,000 pounds;

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wood, Sherman to Cheyenne, \$12.50, car not exceeding 500 cords, all above 500, \$16.50 per car."

"This answer is in the handwriting of Colonel Brownson, except the modification as to the quantity of wood, which Mr. Vining placed upon it in pencil himself. This hay replevied was shipped on this contract. McKay, agent, refused to deliver the hay because the freight was not paid."

The evidence further shows, being admitted by defendant below, that a tender was made of the amount of the freight according to the terms of the above contract. It was claimed by the defendant below; that admitting the special contract to have been made, that it expired with the year 1871, under the rules of the company; one of which was, that all special contracts ended on the thirty-first of December; that the plaintiff was furnished with a circular issued by the company, giving notice that all special rates would cease on and after that day; and that any freight to be shipped would be subjected to the regular tariff of rates of the company; which at that time would amount to seventy-one dollars and five cents per car.

The court below submitted the question of fact to the jury, with the instruction, that if they believed from the evidence that such a contract was entered into between the parties without reference to time, that the law would imply that the freighting should be done in a reasonable time, and that the defendant would be bound by its contract, unless it could show that there was unnecessary delay on the part of the plaintiff; that no matter what were the rules of the railroad company, if it agreed to carry the freight in question at stipulated rates, and the plaintiff proceeded to do the shipping without any unreasonable delay, the company would be bound by its special contract, if entered into by an agent having authority to make such a contract. The jury were further instructed that if they found that such a contract had been made, and that the plaintiff had performed his part of said contract without delay; that a tender

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of the full amount of freight had been made, in accordance with the contract; that the plaintiff was entitled to the immediate possession of the property, at the time the tender was made, and that the plaintiff had sustained damages by reason of the detention; that then their verdict should be for plaintiff; that he receive the property with such damages as, in their judgment, he had sustained; while on the other hand if they should find that there was not such a special contract, or that if there was a contract, and that the plaintiff had failed to comply with his part of its terms, by not shipping the hay as rapidly as possible; that the neglect or refusal on his part would set aside the special contract, and subject him to the ordinary schedule of freights of the company, and that then they should find for the defendant and in either case, should assess the damages in such sum as the evidence warranted.

The errors complained of by the appellant are: 1. That the court erred in refusing to permit a custom of other railroads, as to the expiration of all special rates at the end of each year; 2. That the court below refused to permit the agent of the appellant to testify as to the books of the appellant; and, 3. That the court erred in its instructions to the jury.

With regard to the first complaint, we fail to see any error. The record shows that the custom of the defendant below was permitted to go to the jury without objection, and that having been permitted was certainly as much as should have been allowed, and we think with the court in its instructions to the jury, that if they found that the special contract had been entered into in good faith, the railroad company was as much bound by it as the plaintiff in the action below, and so long as he carried out his part of the contract according to its terms, he had a right to expect the defendant below to do the same. It surely would not be held that if the contract had been made within a few days of the close of the year, that either party had a right to rescind it at pleasure, without the consent of the opposite

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party. And if it could not be rescinded if made a very short time before the close of the year, the difference in time would not give them any more right to do so. This contract was for the transportation of a definite quantity of hay, without regard to time, and no time being mentioned, the legal presumption would be that the plaintiff below should have a reasonable length of time to have the hay carried over defendant's road, and unless it was shown that he was guilty of unnecessary delay in doing the work, he was entitled to have the stipulations of the contract carried out in good faith.

With regard to the second error, we do not clearly see how the freight-books could be admitted in evidence; the law for the convenience of suitors permits the account-books of original entries to be given in evidence, and other books, such as freight-books of a railroad company, may be used as memoranda to refresh the recollections of a witness, but they can only be used for that purpose, and not to prove that the entries therein are correct, and thus make out a case unsupported by other corroborating statements.

The third error is too indefinite to be relied upon; very possibly the judge below did err in some of his instructions, but we fail to see in the instructions given, or in those refused anything to mislead the jury to the detriment of the defendant below. Another error complained of (for there are several not referred to) is that the damages are excessive. This may possibly be true, but from the fact that the case submitted to the jury was to be determined more from the facts than from legal propositions, and the jury being competent to pass upon the facts, the courts will not, as a general thing, interfere with verdicts of this character, unless it be shown that there was a misconception of the facts as given, or a palpable intention to commit a great wrong. We therefore do not find anything to justify us, as an appellant court, to interfere with the verdict.

The judgment is affirmed.

Argument for Plaintiff in Error.

WALDSCHMIDT v. THE TERRITORY OF
WYOMING.

PRACTICE—CRIMINAL CASES.—The provision of the statutes, that in criminal cases the plea of the defendant shall be entered by the clerk of the court upon the indictment, is simply directory not mandatory. *IDEM.*—A failure so to do, unless the defendant is by some means misled thereby, is not a fatal error, or one to justify a reversal.

ERROR to the Second District Court for Carbon County.

T. J. Street, for plaintiff in error.

The plaintiff in error in this cause relies upon the following facts and law :

I. The plaintiff in error was indicted in Laramie county for an assault with intent to murder, at the July term, 1873, of said court (see record, page 5, line 1); and the defendant afterwards caused the venue of said cause to be changed: See record, page 9; also pages 11, 12 and 13.

II. Afterwards the cause was tried in Carbon county: See pages in record, 11, 12, 13, 15, 25, 26, 27, inclusive.

III. Because the court erred in overruling the motion for a new trial, for the reasons stated in the motion. The indictment was clearly insufficient, because the plea was not indorsed on the indictment, and the court in Carbon county could not try the defendant thereon: *Laws Wyoming Territory*, p. 486, sec. 114.

IV. The statute is mandatory. The case could only be tried on the record before the court, and no amendment could be made to the record after trial. The Carbon county court could only entertain jurisdiction by a strict compliance with the statute changing the venue: (*Laws Wyo.* p. 486, secs. 115, 116). The case must have been tried in Carbon county, as if the indictment had been originally made there, and the only jurisdiction of the Carbon county court was based on the certified transcript of the clerk of the Laramie county court, which was on file in the Carbon county court. There is no provision of the statute permitting the records of the Carbon county court to be amended

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after judgment; nor does it appear that any such amendment has ever been made, or attempted to be made. The additional transcript filed on the motion of defendant in error, suggesting a diminution of the record, does not appear to be any part of the record of the court in which the case was tried. Unless the Carbon county court acquired jurisdiction by a compliance with the law on the part of the prosecution, the trial was a nullity. No person accused of crime is bound to make a record showing jurisdiction. The presumption of innocence is so great that the prosecution must show every necessary ingredient of jurisdiction and guilt affirmatively at the time of the trial. This was not done: Laws Wyo. 1869, p. 486, secs. 114, 115, 116.

V. It does not appear from the record that the ground of motion for new trial was untrue as to the incompetency of one of the jurors: See record, pp. 17, 19, 31.

VI. It is objected that the defendant in error has no right to appear in the court except by the attorney of record: Laws Wyo. 1869, p. 492, secs. 145, 188, 501; p. 626, secs. 578 *et seq.*

VII. The plaintiff in error is entitled to a fair and complete review of the proceedings in the court below, and since the filing of the amended transcript by the defendant in error is entitled to have all the matters therein referred to certified and brought up, to the end that errors may be assigned and in furtherance of justice: Laws Wyo. 533, 534, sections 148 *et seq.*

W. W. Corlett and C. W. Bramel, for defendant in error.

In this case a motion is made by the territory of Wyoming to affirm the judgment, because the appellant, Emilie Waldschmidt, in filing her transcript, has failed to conform to rule 7 of this court: See rule 7, page 4, of Rules of Supreme and District Courts of said territory. The object of said rule is to facilitate an examination of the record by the court and to enable the court to refer readily to such portions of the record as are material in connection with errors alleged and referred to in briefs. Without a compliance

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with the rule, it is absolutely impossible for the attorneys for the appellee to comply with rule 7 in framing their briefs. It was the obvious purpose of this rule to render a compliance with its provisions a condition precedent to an examination of the record. If this was its purpose, then it is clear that the duty of the court is simply to affirm the judgment, without looking into the record. In case the court proceeds to look into the record in this cause, the attorneys for appellee submit the following in answer to the various errors assigned.

The answer to the first error assigned is simply that the record does not show any such error, or even the action on the part of the attorney for appellant, or of the court, as is assigned and alleged as the first ground of error.

The second error assigned is contrary to the fact, because the full record in the case shows that the defendant in the court below was duly arraigned, and plead to the indictment. Besides, the defendant below, at the trial, could not rely on the mere absence of proof in the record to show such arraignment and plea without some proof, in view of the fact that the change of venue was taken at her instance and because she went to trial without objection, upon the ground that she had not been arraigned or pleaded. As no change of venue can be granted until after the plea of "not guilty," the court might well assume that such plea had been made: See title IX., chap. 74, Laws of Wyoming, 1869.

In answer to the third assignment of error, it is enough to say that the failure to indorse the plea on the indictment could in no possible way affect the rights of the defendant. And errors which do not prejudice the party alleging them are immaterial, and should be disregarded: U. S. Digest, vol. 3, p. 57; 54 Ill. 258; 30 Iowa, 133; 23 Mich. 24; 48 Mo. 23. The third and fourth errors assigned involve a question of fact, which it appears was settled by the court below upon affidavits; and, as it does not appear that the court below erred in passing upon that question, it is submitted that no error was committed by the court below. As

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to the error assigned in overruling the appellant's motion to set aside the judgment, it is enough to say that it is nowhere specified wherein the said judgment is erroneous. And, as it does not appear that said judgment is erroneous in any respect, prejudicial to the appellant, the court is not authorized to regard the said judgment as defective: 3 U. S. Dig. 58.

By the Court, FISHER, C. J. The record in this case shows that at the July term of the district court in and for the county of Laramie, in the first judicial district, the grand jury found an indictment against Emilie Waldschmidt, charging her with an assault and battery, with an attempt to commit murder by means of a certain pistol commonly called a revolver, upon one August Blucher. To which indictment the said Emilie Waldschmidt, upon being arraigned, pleaded "not guilty." That after said plea she, the said E. W., filed an affidavit of prejudice on the part of the presiding judge at the first judicial district; that upon the filing of which a change of venue was allowed, and the proceedings were transferred to Carbon county, which is and was in the second judicial district. The case was duly tried and a verdict of "guilty" rendered by the jury, who also fixed the penalty, to wit, a fine of one hundred dollars, and the payment of costs by defendant. A motion in arrest of judgment and for a new trial was duly made and several errors assigned, among which were the following:

1. Because the defendant was never arraigned as required by statute;

2. Because the plea of defendant was not written or entered on the indictment as required by law;

3. Because J. Rankin, one of the jurors who tried the cause was not a legal juror in the territory at the time of the trial, which fact was unknown to the defendant until after the verdict of the jury was rendered;

4. Because J. Rankin, one of the jurors, was, on account of his non-residence at the time of the trial, incompetent

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to act as a juror under the laws of this territory, and cited the sections of the criminal code on which defendant relied.

On the part of defendant in error, these several assignments were denied. The motion for the new trial was overruled, to which ruling the defendant below by her counsel excepted, and the record is brought here for review. The first error assigned is fully met and contradicted by the record in the district court for Laramie county, by which it is not only shown that the defendant in that court was arraigned, but that she asked for and was allowed time to enter her plea, and that she subsequently pleaded "not guilty." The second error assigned, viz., that the plea was not entered on the indictment as required by law.

While the record does not show that in this particular the requirements of the statute were strictly complied with, yet we do not find that by the failure of the clerk to write the plea on the bill of indictment that the defendant in the court below was in any way embarrassed by such failure. And it is one of the well-settled principles of the law that a failure to conform to any merely directory statute which does no wrong to a complaining party should be disregarded by a reviewing court, and surely the mere failure to make such an indorsement on the indictment could not, in the nature of the fact, work any wrong to the defendant below; hence we fail to see any substantial error. The third and fourth errors assigned were abandoned by the counsel for plaintiff in error on the argument; hence we are not called upon to give an opinion on them. But we may say that if they had not been abandoned, that the record shows conclusively that there is nothing in the errors complained of, inasmuch as the juror in question has filed an affidavit which has found its way into the record, showing that he possessed all the requisite qualifications to constitute him a competent juror.

We therefore remand the case to the district court, with directions to that court to carry out the sentence in the case, adding the costs which have accrued in this court as a part of the sentence.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
MARCH TERM, 1874.

WILSON *v.* THE TERRITORY OF WYOMING.

PRACTICE—CONTEMPT.—In proceedings against a party for constructive contempt an attachment warrant or alternative order to show cause against the person of the defendant cannot be issued until the proper affidavit has been filed to give the court jurisdiction.

IDEM.—Where an attachment was issued without such affidavit: *Held*, that it was an error which could not be cured by the subsequent filing of an affidavit.

ERROR to the District Court for Laramie County.

The opinion contains a sufficient statement of the case.

Thos. J. Street and Jason B. Brown, for plaintiff in error.

W. W. Corlett, for defendant in error.

By the Court, THOMAS, J. This case was brought to this court upon a writ of error from the first district court, in which said court the plaintiff in error herein had been found guilty of a (constructive) contempt of court, and was sentenced to pay a fine of five hundred dollars, and to stand committed until the same was paid. It appears from the

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record in the case that the judge of said district court, on the eleventh day of April, 1873, at the city of Cheyenne, ordered an attachment to issue against the body of said Posey S. Wilson, for the purpose of bringing him before said court to show cause why he should not be punished for a contempt, consisting, as it was subsequently alleged, of writing from Cheyenne, Wyoming, to the Omaha Herald, a newspaper published at Omaha, in the state of Nebraska, certain articles reflecting upon the first district court aforesaid, and upon the judge thereof.

It is further shown by the record, that at the time such order of attachment was made there were no affidavits nor other evidence whatever before the court showing that a contempt had been committed by the plaintiff in error, and that although an affidavit of the judge of said court was subsequently filed in the case, yet the process was neither amended nor a new attachment issued upon such affidavit.

It is further shown that said Wilson was convicted of contempt upon his own answers, and that no other testimony except the affidavit above mentioned was introduced against him. Without entering upon the question of contempt in this case, and without extenuating or justifying in the slightest degree the very reprehensible conduct, to say the least, of the plaintiff in error, and without considering some other irregularities that appear upon the record, we are of the opinion that an error was committed by the district court at the very commencement of the proceedings, which renders it necessary to set aside the judgment thereof. This consisted in issuing the process of attachment without any valid evidence whatever before the court upon which to found such a proceeding, and although an affidavit made by the judge was subsequently filed, it could not cure the defect. In order to have made the proceeding regular, the attachment should have been set aside and the complainant commenced *de novo* upon the affidavit then filed.

It will be understood that we intend only to apply this ruling to cases of constructive contempt. We further be-

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lieve that the plaintiff in error did not waive any of his rights in these proceedings by appearance, answer or otherwise.

Therefore, upon the error mentioned, the judgment of the district court should be reversed.

Ordered accordingly.

CARR v. WRIGHT.

PRACTICE—DEPOSITIONS.—A motion to suppress depositions should embrace and set forth all the objections thereto.

IDEM.—Part of the exceptions cannot be raised and argued at one time and part at another.

IDEM.—The argument of a motion to suppress depositions must be made before the trial commences.

EVIDENCE—ATTACHMENT.—Where certain parties attached the goods of W. as the property of W. & Co., and W. replevied such property on the ground that he was not a member of such firm: *Held*, that on the trial of the suit in replevin, the evidence of the statements on various occasions by the plaintiff W., that he was a member of such firm, was admissible; and that the exclusion by the court of such testimony was a fatal error.

ERROR to the First District Court for Laramie County.

The opinion contains a full statement of the case.

D. McLaughlin and *Thomas J. Street*, for plaintiff in error.

First error alleged: That the court erred in overruling the defendant's motion in the court below, to strike from the files the motion of plaintiff, in the court below, to suppress the depositions taken by the defendant.

Second error alleged: That the court erred in sustaining the motion of the plaintiff, in the court below, to suppress the depositions taken by defendant. These may be considered together, as they relate substantially to the same matter. It appears from the record, that on the fifteenth day of March, 1873, the depositions of Patrick N. Glynn,

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Thomas Keyes, Jacob Solomon, Peter H. Sharp, W. J. Hamilton and Daniel Shea, had been taken at Omaha, state of Nebraska, to be used on the trial of this cause, on behalf of the defendant. That notice of the time and place of taking depositions had been served on E. P. Johnson, one of the plaintiff's attorneys; and that said depositions had reached this court, and were filed herein prior to March 20, 1873. That on the said twentieth day of March, 1873, plaintiff filed his motion to suppress parts of said depositions, on the grounds of "incompetency and irrelevancy;" and on the same day, plaintiff filed his second motion (under sec. 389, Code, 1869), requiring the court to "hear and decide" plaintiff's motion to suppress, before the commencement of the trial. The court did so "hear and decide," and overruled the motion. On the twenty-second day of March, 1873, two days after overruling the motion to suppress, the case was called for trial, a jury impaneled and sworn, and the plaintiff introduced evidence to establish his cause of action.

After plaintiff rested his case, a motion for a nonsuit was made by the defendant, which prevailed. On the twenty-fourth day of March, the plaintiff applied to the court to set aside the nonsuit, which the court did on the first day of April, 1873; and on the eleventh day of April, 1873, on defendant's application, the cause was continued until next term (July term, 1873). On the twelfth day of August (July term), 1873, the case was called for trial, and, by agreement of attorneys, Judge Fisher was excused from presiding at the trial, and Judge Carey, by consent, presided thereat. On the thirteenth day of August, 1873, the day after the case was called for trial at the July term, plaintiff moved to suppress the depositions taken theretofore by the defendant, for the reason that "no notice of the taking the same was given, as required by law." This motion was sustained by the affidavit of E. P. Johnson, which is now a part of the record. Thereupon, on the same day, August 13, 1873, defendant moved to strike the motion

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of plaintiff to suppress the depositions from the files. The court denied this motion of the defendant, and herein is alleged the first ground of error; and the court sustained the motion of the plaintiff to suppress the depositions theretofore taken by defendant, and therein is alleged the second ground of error. As to when exceptions to depositions may be taken, other than for incompetency or irrelevancy, see Laws of Wyoming, secs. 382, 388, 389; also *Cowan v. Ladd*, 2 Ohio St. 522; *Crowell v. W. Res. Bank*, 3 Ohio St. 406.

Third, fourth and fifth errors: These may also be considered together. The plaintiff in his direct examination said: "On the forenoon of that day, I was in possession of the above described goods, at Cheyenne, on Seventeenth Street, in the store of Hays & Benton; and was at that time the owner of the same, at the time they were taken by defendant:" page 34, lines 8 to 15 inclusive. The plaintiff having testified on his own behalf, on his direct examination, that he was the owner of the goods, it was proper cross-examination to ask him the question referred to; and it was error in the court to sustain the objections to them made by the plaintiff.

Sixth error: The refusal to permit the question alluded to from being asked, was manifestly erroneous. The witness was not required to state what the papers contained; only to state what they purported to be.

Seventh, eighth and ninth errors: Clearly error, because no connection between defendant, Carr, and Mead was established, and it was wholly immaterial how Mead took the goods, no proof showing that he was acting for Carr.

Tenth error: Refusal of court to sustain motion for nonsuit. "If the evidence adduced by the plaintiff will not authorize the jury to find a verdict for the plaintiff, it is the duty of the court to nonsuit him:" Laws 1869, p. 529, sec. 116; *Pratt v. Hall*, 13 Johns. 334; *Labar v. Koplin*, 4 Const. N. Y. 547; *Stuart v. Simpson*, 1 Wend. 376; *De Meyer v. Souzer*, 6 Id. 436; *Wilson v. Williams*, 14 Id. 146;

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Doane v. Eddy, 16 Id. 523; *McMartin v. Taylor*, 2 Barb. 356; *Carpenter v. Smith*, 10 Id. 663; 2 Cal. Dig. Cases cited, 31.

Eleventh, twelfth, thirteenth and fourteenth errors: See the pleadings in the action; allegation of copartnership in the answer; no denial of allegation verified by the affidavit of the plaintiff: Code 1869, p. 529, sec. 116.

Fifteenth to twenty-fourth error, inclusive: May be considered together, and for same and similar reasons.

Twenty-fifth and twenty-sixth errors: May be considered together, for same and similar reasons.

Twenty-seventh error: Same and similar reasons and authority as for eleventh and twelfth alleged errors.

Twenty-eighth error: Refusing to set aside verdict for errors of law; and on account of newly discovered evidence.

Twenty-ninth error: see Code 1869, p. 592, sec. 438.

E. P. Johnson and W. W. Corlett, for defendant in error.

This is a petition in error brought to reverse the judgment of said cause rendered in the district court of Laramie county.

I. The first two errors may be considered as one, and involve the question as to whether the court erred in suppressing certain of defendant's depositions on the motion of the plaintiff. The motion to suppress the depositions was based on insufficiency of the notice on which they were taken in giving the plaintiff sufficient time. As the record here does not contain that notice, the propriety of the decision of the court below cannot be considered here. But it is insisted that the trial commenced before said motion was heard. But the record shows that after said motion to suppress depositions was sustained, the jury came to try the cause: See page 31 of record. But it is claimed that because previous to that time a motion to suppress parts of the depositions for incompetency and irrelevancy had been refused that the matter was *res adjudicata*. But the statute permits an objection for incompetency and

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irrelevancy to be made on the trial when the evidence is offered. That right cannot be taken away. Besides, the motion to suppress parts of said deposition was overruled, simply because it could not then be determined whether or not the objections were well taken. As is well known, it is the constant practice of the courts to postpone the final decision of such questions until the trial develops whether or not the evidence objected to is really incompetent or irrelevant. But we deny that the decision of Judge Fisher was in any way binding on Judge Carey. Judge Carey occupied precisely the same position and possessed the same authority that Judge Fisher would have possessed if no changes of judges had occurred. Now if Judge Fisher had remained on the bench on the trial of this case, he would have possessed the undoubted power, at any time during the term of said district court, to reverse any or all of his decisions in any case. So Judge Carey, taking his place, possessed an equally undoubted power to decide any question that arose before him. On these points, see section 276 of the code of 1869, p. 562, Laws of 1869. Also, see section 387-9, 396 of same code, p. 583, Laws of 1869.

II. As to the third error assigned, it suffices to say that the question was not proper cross-examination, and did not relate to any matter at issue in the case. The plaintiff merely stated on his examination in chief that on a certain named day he was the owner of and in the possession of the goods replevied. Nowhere in his examination in chief did he testify a word as to, from whom, or when or where he obtained the goods; hence the defendant had no right to cross-examine to that extent. The extent to which the right of cross-examination may be carried rests in the discretion of the court *at nisi prius*, and is not the subject of review for error: See Greenl. on Ev., sec. 449; 7 Cush. 547-550.

III. The fourth and fifth errors assigned were precisely the same as the third.

IV. The sixth error assigned is absurd upon its face. To

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allow a witness to state what a paper purported to be would be infinitely worse than to allow the witness to state the contents of a paper without first showing it to be lost.

V. The seventh error assigned is shown to be worse than puerile by examining the cross-examination of plaintiff, wherein it appears that the fact is elicited that Mead took possession of the goods, first acting for the defendant Carr: See record, p. 30.

VI: The eighth error assigned has just as much in it as the seventh and no more: See the record, p. 30.

VII. The ninth error assigned is subject to the same remarks as the seventh and eighth.

VIII. As to the tenth error it is enough to say, that the defendants' answer admits the taking of the goods. That matter was not in issue, therefore, and it was wholly unnecessary to prove that Carr took the goods at all as that was admitted in the answer. But even if such proof was necessary we simply refer the court to the testimony of the plaintiff which was in when the motion to non-suit was made: See record, 32 to 42 inclusive.

IX. As to the eleventh error, it suffices to say, that they were clearly inadmissible in the first place, and that the defendant finally amended his answer so as to conform it to the writs, and thereupon the writs were received in evidence. All these writs simply commanded the sheriff to levy upon the property of certain firms as such, not giving the names of the members of the firms. Nothing could, therefore, be taken upon these writs, but the property of said firms, and not the property of any individual. On this question see sections, 830, 831, 832 and 833 of the code of 1869; Laws of 1869, 679, 680.

X. The thirteenth error cannot be considered, for the reason that the rejected written evidence is not in the record; besides it is apparent that the summonses were inadmissible.

XI. The fourteenth error cannot be considered, because of the reasons just stated, as to the thirteenth error.

XII. The fifteenth error assigned, is disposed of by

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simply considering whether the question asked Powell related to any matter in issue by the pleadings. Under the pleadings the only issues were: 1. Was George L. Wright the owner of certain designated goods at the time of the commencement of the action; or, 2. At the said time did the goods belong to certain firms, designated in the said writs of attachment. Excepting the damages, these were the only questions in issue in the case. It must be apparent at once, that the questions propounded to Powell had not the remotest relation to the issues.

The sixteenth error assigned is subject to the same observation as the fifteenth.

Before concluding, counsel desires to refer to the claim made by counsel for defendant, to the effect that the allegations, as to the existence of certain partnerships in the answer was conclusive, because not denied by a sworn reply from the plaintiff. We answer, what of it? The defendant abandoned every answer but the last one filed by amendment; and now suppose, for the sake of argument, we admit that the allegations respecting the existence of certain firms as made in said answer are true, how does that help the defendant? Suppose the existence of those firms is conclusively admitted; does that prove that they own the property in question. But perhaps it is claimed that the allegation, that said firms owned the property, is also to be taken as true. But, clearly, no reply can be filed, save in answer to a set-off, or counter-claim. There is neither counter-claim nor set-off in the answer in this case, and on this question see sections 110 and 137, code of 1869; Laws of 1869, 528 and 532.

By the Court, FISHER, C. J. On or about the fourth of January, A. D., 1873, several attachments were issued by merchants in the city of Omaha, in the state of Nebraska, against a firm alleged to be composed of the defendant in error, and several others, sometimes known by the name and style of Wright & Co., G. W. Wright & Co., and by

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several other designations. That by virtue of these several writs of attachment, certain goods, wares and merchandise, in the possession of the said defendant in error, who it was alleged was a member of the firm aforesaid in all its various forms, were attached to satisfy the claims of the attaching creditors by the sheriff of Laramie county. Shortly after the service of the said attachments, and the taking possession by the said sheriff of the said goods, wares and merchandise, the defendant in error, who was plaintiff below, had a writ of replevin issued, and, by virtue thereof, the said goods were returned to him by the sheriff, and on the trial, the defendant in error, who was plaintiff below, recovered a verdict for the sum of fifteen dollars. The counsel for the plaintiff in error, who was defendant below, filed his motion for a new trial, and assigned the same errors, which are set out in the petition in error; said motion being overruled, they brought the case to this court and assigned twenty-nine errors as follows:

The first error complained of is that the court below erred in refusing the motion of the defendant below to strike from the files of the court a motion filed by the counsel for plaintiff, to suppress certain depositions taken on behalf of defendant.

The record shows that the case was called for trial on the twelfth day of August, 1873, and that the motion to suppress the depositions was filed on the day following, after, as it is alleged, the trial has been commenced. While, on the other hand, it is claimed on the part of defendant in error that the trial did not commence until August 13, and that previously to the beginning of the trial the motion to suppress the depositions had been made and sustained. It therefore becomes a question for this court to determine when the trial properly commenced, so as to know whether under the statutes the time had expired when the motion should have been allowed or not.

The record further shows, that on the twentieth day of March, 1873, the then attorneys for the defendant in error, plaintiff below, viz: E. P. Johnson and Wm. H. Miller,

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filed a motion to suppress portions of the same depositions, on the grounds of incompetency and irrelevancy, which motion was overruled, and it is therefore claimed that the plaintiff was estopped from filing any other exceptions; first, upon the ground that the question was *res judicata*; and, secondly, that all the objections to the depositions should have been included in the first motion; and, thirdly, that the trial commenced on the twelfth of August, and that by the provision of the statute it was too late to sustain the motion to suppress.

The next error, or rather set of errors, complained of was the refusal of the court to permit the defendant in the trial below to introduce evidence to sustain the allegations of the answer to plaintiff's petition that he, the plaintiff, was a member of the firm of Wright & Co., G. W. Wright & Co., and the various forms of partnership alleged in the affidavits upon which the attachments were issued—for this purpose the defendant called several witnesses—and also claims that the suppressed depositions would have established the fact as stated, viz: that the plaintiff below in this action had admitted that he was a member of the firm thus variously presented; all of which the defendant below was prevented doing, both by the suppression of the depositions and the refusal of the court to admit the witnesses called to testify to the statements of the plaintiff below made at various times and to different persons.

The next and last exception requiring special notice by this court was the refusal of the court below to order a nonsuit at the close of the testimony for the plaintiff below. The record shows that the action of replevin was commenced against T. Jeff. Carr in his individual capacity, while the defendant below (Carr), in filing his answer, denies all the allegations of the plaintiff's petition, and then justifies as sheriff. For this reason the counsel for the plaintiff below contend that, although the answer denies the allegations of the petition, yet this farther answer in justification is such an admission on his part as would not only

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relieve the court from granting the nonsuit, but leaves it obligatory on the court to refuse the motion.

We have passed over a large number of the exceptions filed by the plaintiff in error, inasmuch as the whole controversy is involved in a few of the questions raised and upon which the plaintiff in error relies, and in passing upon the exceptions we propose to vary somewhat the order in which they are presented, and therefore first pass upon the question of the nonsuit; while we shall not hold it to be error in the court below having refused the nonsuit when asked, neither would we have held it to have been error to have allowed it. There is so much in the discretion of the court on the subject of nonsuits, that the record should show beyond all doubt such a state of facts that a court of *nisi prius* has no grounds to either grant or refuse the demand for nonsuit (as the case may be) when made, before a reviewing court should reverse its rulings; in either case that such reviewing court should hesitate in setting aside the proceedings for either such granting or refusal. And while we think that we might have ruled differently, the record in our judgment does not present such a state of facts as would justify the court in calling it error to refuse the nonsuit.

On the questions of suppressing the depositions, we have no doubt that the court erred. First, we think all the exceptions to the depositions should have been raised at the time the exceptions were presented at the March term, so that the court might have passed upon them. It was folly to expect a court to pass upon the question of their relevancy or pertinence at that time, inasmuch as neither of these questions could have been passed upon previous to the hearing of the other parts of the testimony, which alone could enable the court to know whether the depositions were proper or not; but if the question as to the time of taking the depositions had been raised there, there need be no doubt upon that point, as it is one settled by the statute. But we think that one question having been raised, it was the duty of the party raising it to present any and all other objections at the same

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time. Furthermore we think the record shows that the trial had commenced before the motion to suppress for want of proper notice was raised. It was held by the counsel for defendant in error, on the argument upon the exceptions, that the trial commenced when the jury was sworn. This was a special view of the subject, but we think very unsound; sad experience has taught us that a very large space of time is often consumed in the trial of cases before the jury is sworn, or even called, and we think the record clearly justifies us in considering this case on trial on the twelfth of August, 1873, while the motion to suppress the depositions does not claim to have been filed until the thirteenth; therefore in either view of the case we think the motion came too late. If we are right in holding that all the exceptions should have been taken at the March term, and we have no doubt upon that question, then it was not important whether the trial commenced on the twelfth or thirteenth of August, either day would be too late to make a motion to suppress. While admitting that this point was not well taken by the plaintiff in error, if the trial commenced on the twelfth of August, and the motion filed on the thirteenth, it was a fatal error to refuse the motion to strike off the plaintiff's (below) motion to suppress.

On the several exceptions to the ruling of the court to refuse the defendant below to prove the partnership of George L. Wright in the firm, which has assumed so many forms, we think there was manifest error. The defendants below set out in their answer the fact, or at least alleged fact, that the plaintiff was not the owner of the goods taken in replevin, but that they were held by the said firm. Surely they had a right to offer proof to establish this allegation; and if the questions which the record shows were put to the several witnesses, or at least some of the questions, were refused, we are at a loss to conceive how it would be possible to establish the allegations of the defendant's answer.

We fail to find anything in the authorities cited which relieves the rulings of the court from the errors above re-

Argument for Plaintiff in Error.

ferred to. While we have passed over a large number of the exceptions set out in the brief of the plaintiff in error, we think there are ample grounds in the ones passed upon to justify us in refusing to affirm the proceedings as presented in the record.

We therefore reverse the judgment, and remand the case for a new trial.

THE TERRITORY OF WYOMING *v.* PIERCE.

PRACTICE IN CRIMINAL CASES—ARREST OF JUDGMENT.—A motion in arrest of judgment can only reach defects apparent in the record.

IDEM.—Where a question raised as to a defect in the jurisdiction of the court did not appear in the record: *Held*, that a motion in arrest of judgment was improperly sustained.

IDEM.—No defect in evidence can be urged for an arrest of judgment.

ERROR to the First District Court for Laramie County.

A sufficient statement of the case is contained in the opinion.

W. W. Corlett, for plaintiff in error.

In this cause no objection was taken at any time to the jurisdiction either of the grand jury or the court, until the same was taken by the motion in arrest of judgment. Previous to this a motion for a new trial had been made in the case and overruled.

I. The defect in jurisdiction did not appear in the record. A motion in arrest of judgment can only reach defects apparent in the record: See 1 Arch. Crim. Prac. and Plead. 672 *et seq.*; 1 Bish. Crim. Pro. sec. 850 *et seq.*; 1 Whar. sec. 603.

II. On the question of the jurisdiction of the court: see 1 Bish. on Crim. Law, sec. 552 *et seq.*; 2 Whar. on Crim. Law, sec. 1052 *et seq.*; 12 Pick. 496, 505, 506; *Burns v. People*, 1 Parker, 182, 185; *Riley v. The State*, 3 Humph. 649; *Rex v. Burdett*, 4 Burn. & Ald. 95, 173; Laws of Wyoming, 1869, p. 486, sec. 115.

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William H. Miller and W. P. Carroll, for defendant in error.

In response to the bill of exceptions herein filed, in behalf of the territory of Wyoming, as plaintiff in error, by the prosecuting attorney of the county of Laramie, W. W. Corlett, William H. Miller and W. P. Carroll, attorneys of said court, duly appointed by J. W. Fisher, chief justice of said territory and judge of the first judicial district, to argue against the prosecuting attorney, in the supreme court, all the matters which may be properly presented to said court by the said bill of exceptions and in the records of said cause, duly and properly certified to the said supreme court. In pursuance of said appointment we will, in the argument of said cause and of the errors assigned in said bill of exceptions, and for the purpose that the judgment of the court below in the cause may be sustained by the said supreme court, refer to the following citations and authorities, to wit: 1 Bright. Fed. Dig. p. 319, sec. 491, *U. S. v. McGill*; and sec. 492, *U. S. v. Bladin*; also to 2 Abb. Nat. Dig. p. 77, 31, and p. 617, sec. 21; 1 Bish. Crim. Pro. p. 48, sec. 68 and the following sections; also to 2 Green's Rep. (Iowa), 286, and the following pages in case of *Nash v. State*, 2 Whar. Amer. Crim. Law, sec. 1052 and following pages, with notes b and c; also to 1 Bish. Crim. Law, sec. 67, and following pages and notes; 2 Black. 268; Laws of Wyoming, 1869, chap. 15, p. 291, title Common Law; Laws of Wyoming, 1869, p. 500, sec. 184; 19 How. 395, 445 and 451; 1 Kent, p. 363, sec. 341-2, also p. 500 and 354 following; 2 Story on Con. p. 484, sec. 1645; also p. 568. Organic Act Wyoming territory; Bennet & Heard, 2 Mass. Dig. 48; 1 Bright. Fed. Dig. p. 506, sec. 97, also secs. 109, 110; Ros. Crim. Ev. p. 180, title Jurisdiction.

By the Court, CAREY, J. This is a bill of exceptions presented by the prosecuting attorney of Laramie county, and filed by permission of this court, under sections 146, 147, 148 and 149 of the code of criminal procedure.

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The record in this cause shows that the defendant Richard Pierce, was indicted, arraigned, and after pleading not guilty, was tried and convicted of the crime of manslaughter at the November term, 1873, of the district court, first judicial district, in and for the county of Laramie. The jury that found the verdict fixed the term of imprisonment at three years. The defendant at the same term moved the court to set aside the verdict and grant a new trial, which motion, after argument, was overruled. Thereafter, at the same term, the defendant filed a motion to arrest the judgment, which motion, after argument by counsel, was sustained by the court. The reason assigned in the motion is as follows: "That the grand jury which found and returned the indictment had no authority to inquire into the offense charged in said indictment, by reason of its not being within the jurisdiction of the court." The prosecuting attorney, under section 146 of the code of criminal procedure, excepted to the ruling of the court in sustaining the motion for arrest of judgment, which exception is the basis of the bill of exceptions filed in this cause. The motion for arrest of judgment is in the language of first subdivision of section 184 of the code of criminal procedure, which provides for the arrest of judgment in certain cases.

The question, therefore, presented to this court for decision is, whether the district court erred in arresting the judgment which reduces itself under the motion to the proposition whether the cause did exist for an arrest of judgment as is alleged in said motion. The law, as held by the courts of England and adopted by the courts of this country in the absence of statutory provision, is, that a cause for which a motion for arrest of judgment may be grounded, must be an objection which arises upon the face of the record itself, and which makes the proceedings apparently erroneous, and no defect of evidence can be urged for arrest of judgment: 1 Archibald's *Crim. Prac.* 671; 1 Bishop's *Crim. Proc.* sec. 850; Whart. *Crim. Law.* sec. 3043, and cases cited therein. The foregoing has also been

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held to be the law in Indiana, where the statute similar to ours, provides that judgment may be arrested on a verdict when there is a want of jurisdiction in the court over the offense charged: 5 Ind. 1. The crime of manslaughter is an offense against the laws of this territory; and section 115 of the code of criminal procedure provides that offenses must be tried in the county where committed, unless there is a change of venue or judge.

The indictment in this case charges that the defendant committed the crime of manslaughter within the county of Laramie. The grand jury that found the indictment was impaneled in the district court, sitting in and for said county, to inquire into all offenses alleged to have been committed in said county. The jurisdiction of the said court is extensive with the boundaries of the said Laramie county, and there can be no doubt that it had jurisdiction of the offense as charged in the indictment. If the evidence did not maintain the charge in the indictment and justify the verdict of the jury, and the court overruled a motion for a new trial on this ground, it should have been assigned as error by the defendant. No defect in the evidence can be urged as a ground for an arrest of judgment. Any matter for which a new trial may be granted is waived by neglecting to move for a new trial for that reason: 12 Indiana, 675; 14 Id. 540; and 15 Id. 274.

For the foregoing reasons the decision of this court is; that the district court should not have sustained the motion for arrest of judgment on the verdict.

Argument for Plaintiff in Error.

BONNIFIELD *v.* PRICE.

DEMURRER.—Where a petition upon its face shows that the claim upon which the action is brought is barred by the statute of limitations, or that a plea of that statute may be successfully interposed, a demurrer to the petition on that ground should be sustained.

IDEM.—Where a demurrer is sustained or overruled, it lies solely in the discretion of the court whether or not to permit either party to amend his pleadings.

ERROR to the First District Court for Laramie County.

The opinion of the court contains a full statement of the facts in this case.

E. P. Johnson, for plaintiff in error.

It is contended that the court erred in sustaining the demurrer for two reasons: 1. Because the defense of limitation cannot be set up by demurrer; 2. Because the petition did not show on its face that the action was barred.

I. It has long been settled by almost universal practice that the defense must be pleaded specially or it is waived: Angel on Lim. In some states where codes prevail, it has been held demurrer would lie unless it appears upon the face of the petition that the action is barred, but the reason given is that such was the English chancery practice, and the code practice comes nearer that than any other, and the chancery rule was accordingly adopted: 2 Cal. Digest, 99; 8 Ohio St. 215, 423. But it is obvious that inasmuch as the chancery and law practice are not merged but remain separate in this territory, that reasoning does not apply to us. But aside from the inconvenience of placing ourselves in an anomalous position as regards the practice or the authority of other states, whose reasons for the same do not apply to us, it is submitted that this court is bound by the law as expounded by its appellate court. The supreme court of the United States, acting on cases that come up from states, acts with reference to the construction of state statutes, as an inferior court, by simply adopting the construction of the

Argument for Defendant in Error.

state courts. But its relation to the territories is that of a supreme court, vested with authority to expound the law, and its decisions are not only to be respected by the territorial courts, but they are bound by its judgments. So far as that court is authority, the rule that this defense must be pleaded is maintained: 17 Wall. 168. But, in the second place, should it be held to be correct that demurrer will lie to a petition showing upon its face the bar of the statute, it would still be error in this case to entertain the demurrer, for the reason that the defense does not appear upon its face, and is only made to appear, if at all, by the introduction of evidence, to wit, the laws of California, of which the court could take no judicial notice. It appears from the face of the petition, that judgment was rendered in California, upon which suit was brought. There is no allegation that any of the parties are or ever have been residents of Wyoming, and in the absence of such allegation, the presumption is that all are residents of California. Our statute does not run in favor of persons out of the territory. The court cannot take judicial notice of the laws of California. The authorities are all to the effect that the defense must appear on the face of the pleading to render it demurrable: 2 Cal. Dig. 215; 8 Ohio St. 423; 7 Id. 229.

II. On the question of allowing plaintiff to amend after the demurrer to his petition had been sustained, counsel cites: 3 Black. 409; Powell on App. Pro. 163, 196; 1 Nash, 300; 20 U. S. Dig. 649; 12 Id. p. 426, sec. 168; 9 Peters, 405.

D. McLaughlin, for defendant in error.

Action on a judgment of the ninth district court of the State of California. Judgment entered December 14, 1861. Suit begun in first district court of Wyoming, November, 1873, or nearly twelve years after obtaining judgment. Defendant Price appears and demurs specially to the petition. Demurrer sustained. The court was correct in sustaining the demurrer.

Argument for Defendant in Error.

I. The complaint does not allege that the court that rendered the judgment, viz: the district court of the ninth judicial district of the state of California, was a court of general jurisdiction; or that for any special reason it was a court of competent jurisdiction, and had acquired control over the person of the defendant and the subject of the action. "A complaint on a judgment of a circuit court of another state must either aver the fact of the existence of a general jurisdiction in that court, or it must aver a limited jurisdiction which extended to the cause of action for which the judgment was recovered, whatever it was, and that the court had jurisdiction of the person of the defendant." Petition does not state that the judgment sued upon "was duly given or made:" *McLaughlin v. Nichols*, 13 Abb. Pr. Rep. 244, cited 6 Abb. N. Y. Dig. 466, n. 316; to the same purpose, see 1 Abb. Pl. & Pr. 334; Voorhies' Code, 326, note '6; Seney's Code, 162; 2 Handy, 163.

II. The plaintiff's petition does not state the name of the court in which the action is pending, as required by section 92, subd. 1, Code 1869. The name of the court is "The district court of the first judicial district of the territory of Wyoming," and not the "first district court in and for Laramie county, sitting."

III. No copy of the written instrument upon which this action is founded, *i. e.*, the transcript of the judgment, is attached to and filed with the petition; nor is the reason stated in the pleading why it is not so attached and filed: See sec. 127, Code 1869. See Freeman on Judgments, and 10 Cal. Rep. 307, that a judgment of that state is both a record and a contract; that for the purpose of issuing execution it is a record, but to be used as evidence it is a contract, and the transcript is as much the written instrument as a note or bill would be.

We come now to the consideration of the statute of limitations of Wyoming territory, and to its application to the present case.

Object and purpose of the statute stated: 3 Par. Con. 61-

Argument for Defendant in Error.

67, 94-98; 5 Mason C. Ct. Rep. 523; *Leffingwell v. Warren*, 2 Black, 599. That the statute of limitations may be interposed by demurrer when the lapse of time appears on the face of the petition: *Vide Williams v. First Pres. Church*, 1 Ohio, 508; *Sturges v. Burton*, 8 Ohio, 215; *Mason v. Cronise*, 20 Cal. 211, and the cases referred to in that decision; *Humbeit v. Trinity Church*, 24 Wend. 587. Such defenses are not to be discriminated against: *Sheldon v. Adams*, 41 Barb. 55.

Application of plaintiff to amend his petition by alleging that the statutes of California and of Wyoming had not run against the cause of action, which was refused by the court. That the court was right in this, see following: 1. It would be a substantial change of the cause of action, from no cause of action to a legal cause of action, and would wholly change defendant's defense; 2. The court can amend whatever is irregular, but cannot amend any of its proceedings tending to confer jurisdiction: *Hallet v. Righters*, 13 How. Pr. 43; also 1 Abb. Nat. Dig. 79, note 89; *Id.* 84, note 141; *Wright v. McKelligon*, Wyo., and 1 Handy, 573, 574. All going to support the ruling of the court.

In the Wisconsin railroad cases this fall, Circuit Judge Drummond resisted an application on the part of counsel for the state of Wisconsin to amend the pleadings by striking out the name of one of the railroad companies, and held the course suggested as at the best questionable. The "cause of action," if one is stated in the petition, was barred by the statute of limitations of this territory, and also by the laws of California, when this suit was begun; and this is apparent on the face of the petition: 1. The cause of action accrued more than five years before the filing of the petition, that is to say about twelve years before; and no fact is averred as a new promise to pay, or the like to obviate the running of the statute against the cause of action. 2. "When a cause of action has been fully barred by the laws of any state, territory or country, where the defendant had previously resided, such bar shall be the

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same defense in this territory as though it had arisen under the provisions of this title:" Sec. 29, Code 1869.

The effect of this section of our code is to give full effect to the statutes of limitation of the state of California within this territory, in their operation on the judgment, alleged as the cause of action in this case. This must be admitted, as the intention of the law-makers is clear enough. The law of that state limits the period to actions on judgments to five years after entry: Hittel's Laws Cal. para. 4359, 5149; also Parker's Laws Cal. para. 9129; *Mason v. Cronise*, 20 Cal. 211; *Bowers v. Crary*, 30 Cal. 621; *Mann v. McAtee*, 37 Cal. 11. These authorities are sufficient to show that the judgment sued on was not only barred by the statutes of limitation of the state of California, after the fourteenth day of December, 1866, but that it became defunct and was dead, and beyond the reach even of a new promise to revive. "Every process which may be required to completely enforce a judgment, must be taken out within five years after entry:" *Bowers v. Crary*, 30 Cal. 621.

By the Court, THOMAS, J. The petition in this cause alleges that the plaintiff, Bonnifield, did on December 14, 1861, recover judgment in the district court of the ninth judicial district of the state of California, against the said George F. Price and one Tyson, for one thousand seven hundred and sixty-five dollars and seventy-one cents, and that the same still remains unpaid and in full force and effect. To the petition the defendant interposed a special demurrer, for the reason "that the cause of action did not accrue within five years prior to the filing of the petition;" and the sustaining of this demurrer by the district court sitting in and for Laramie county, is the principal error assigned in the petition filed in this court. While in some states the statutes especially provide that a defendant can avail himself of the statutes of limitation only by plea or answer, yet we consider the rule to be well established in this territory, and in some states with similar laws to ours, that where

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from the face of the petition it is apparent, without any further showing, that the statutes of limitation have commenced to run, that a defendant may take advantage of the same by a special demurrer.

In this case, upon the decision of the demurrer, there was no legal evidence whatever, before the court, neither could there have been as to the provisions and effect of the statutes of California. The petition showed, upon the face of it, that the claim was founded upon a foreign judgment, and that that judgment had been recovered more than five years prior to the commencement of this action. In our opinion, therefore, the district court committed no error in sustaining the said demurrer.

Another error assigned is, the refusal of the district court to allow the plaintiff to file his amended petition. We believe that, where a demurrer has either been sustained or overruled, that the question of allowing either party to amend is solely in the discretion of the court. And even were the rule fully established, which we do not consider it to be, that an appellate court may reverse a decision of a court below, solely upon the grounds of error committed by that court in a matter entirely within its discretion; we do not perceive sufficient error in this particular to interfere with that decision.

The judgment of the district court is affirmed.

Argument for Appellant.

IVINSON *v.* HUTTON.

PRACTICE—CHANCERY.—Where a bill of complaint in chancery showed upon its face that complainant had a remedy at common law: *Held*, that the court erred in not sustaining a general demurrer to the bill.

IDEM.—Striking out certain words from the original bill of complaint, especially where it is not again verified, is not an amendment of such bill.

IDEM.—Neither is it such an alteration or amendment as could change the jurisdiction from a court of common law to a court of chancery.

IDEM.—If a demurrer is sustained to a bill of complaint, and complainant, by permission of the court, amends the bill, the court has no power to limit the defendant's time to answer. That is fixed by law.

APPEAL from the Second District Court for Albany County.

W. W. Corlett and *S. W. Downey*, for appellant.

The appellant seeks a reversal of the judgment and decree of the district court in this cause for the following errors of the district court, which it is alleged appear in the record in this cause, and which are claimed to be material errors and prejudicial to the appellant:

I. The court erred in ordering the defendant to plead to the so-called amended bill of complaints. There was error in this for two reasons: 1. Because the amendment to the bill was not properly made, and left the bill as amended without being sworn to; 2. Because when the court made the order, the defendant, under the statute, was entitled to notice of the filing of the amended bill, said notice to be served on him, and after receiving such notice, was not bound to file an answer until the fifth Monday thereafter. But neither the notice nor the time was given. Upon the first error assigned see the following: Code of Civil Procedure of 1869, secs. 761, 762, p. 113; 1 Daniel's Ch. Plead. and Prac. 402, 403, note; *Rogers v. Rogers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Id. 67.

II. The court again erred in overruling the defendant's demurrer to the amended bill, and in ordering the defend-

Argument for Appellant.

ant to answer the amended bill by September 17, 1873: 1. For the same reasons as those given in relation to the first error above; and, 2. For the reason that the bill of complaint was wholly defective, and did not state a case in equity. See authorities cited under the first error assigned above: *Daniels Ch. Plead. and Prac.* 374; *Watson v. Cody*, 1 Wis. 420; *Prescott v. Everts*, 4 Id. 314; *Connors v. Connors*, 4 Id. 112; *Story's Eq. Pl. secs.* 251, 800; *Laycroft v. Dempsey*, 15 Wend. 83. An examination of the bill of complaint in the cause will show that it wholly fails to point out and specify the item or items of the account as adjusted, wherein it is alleged the mistake occurred: *Herne v. New England Mutual Ins. Co.*, *Chicago Legal News*, Jan. 30, 187-, p. 145, *Sup. Ct. of U. S.*, October term, 1874. Nothing is better settled in chancery pleading than the fact that a bill is radically defective and demurrable which does not show wherein an account is erroneous before application can be made to open the account. Again the bill was defective and demurrable, because although it sought to have an account which it alleged had been stated and settled between the parties anew by the court, it failed to first apply to have the account so stated and settled opened with leave either to surcharge or falsify. On this question see *Daniels Chan. Pl. and Pr.* 691-3 and cases there cited. When the first demurrer was sustained, it may well be questioned whether the complainant could bring himself within the jurisdiction of a court of equity by simply striking from his sworn bill those averments which disclosed that he had an adequate remedy at law, for which reason the court sustained the first demurrer: *Daniels Chan. Pl. and Pr.* 623.

III. The third error complained of is that the court referred the case to a special master, when on the pleadings there was no issue of fact upon which evidence should be taken, there being no replication on file in the case at the time. Besides, no authority can be given to a master in this territory to report findings of fact from evidence taken before him: See *Code of Civil Procedure of 1869*, sec. 759.

Argument for Appellee.

IV. The fourth error complained of is that the court erred in permitting the complainant to file a replication after the evidence was all taken, and the case ready for hearing and argument on the report of the master and the evidence. The replication, it will be noticed, states that it is filed as of the September, 1872, term, thus making the filing *nunc pro tunc*. The order of the court herein, it will be observed, does not permit it to be filed *nunc pro tunc*. Upon this error assigned, see Daniels Ch. Pl. and Pr. 826; *Childs v. How*, 1 Clark, Iowa, 432; *Rogers v. Mitchell*, 41 N. H. 154; *Pierce v. West*, 1 Peters C. C. R. 531; *Pickett v. Chilton*, 5 Manf. 467; *Scott v. Clarkson*, 1 Bibb, Ky. 277.

V. The fifth and sixth errors assigned in this case virtually involve the same point. The fifth being that the court erred in confirming the report of the special master, and the sixth being that the court erred in entering a decree for the complainant in the case. The questions presented here, of course, involve many minor ones relating, in part, to the action of the special master, the admissibility, and effect of the whole and certain portions of the evidence taken, and the form and extent of the decree, as well as the right of the court to enter any decree in the case, save one of dismissal. The defendant, in his answer, insisted upon the fact that a court of equity had no jurisdiction, and asked, notwithstanding that his demurrer was overruled, that he might have the benefit of the fact on the hearing. That this question may be taken advantage of on the hearing, admits of no doubt: See Story on Equity Pleading, section 447. Effect of appeal in chancery: See *Pierson v. Wilson*, 2 G. (Iowa) 20; *Stockwell v. David*, 7 G. (Iowa) 115; *Austin & Spicer v. Carpenter*, 2 G. (Iowa) 131-5; Hil. New Trials, Appeals.

J. W. Kingman, for appellee.

The final decree alone can be appealed from, and not the interlocutory orders or rulings during the progress of the case: See Code of 1873, sec. 700; 2 Daniels Chan. Prac.

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1459, 1462, note, 1472, 1477, 1485, 1488. This is not an appeal as now presented; but a writ of error as at common law.

By Court, FISHER, C. J. This was an appeal from the district court of Albany county. The parties had been partners in the buying, raising and selling of cattle, horses, etc., under certain terms not set out either in plaintiff's bill or defendant's answer. It is, however, set out, that on or about the twelfth day of April, A. D. 1873, they entered into a stipulation for the dissolution of the said copartnership by the terms of which they agreed that the defendant was to pay the amount which the plaintiff had contributed to the capital of the firm, and five thousand dollars in addition thereto, as a bonus for the use of plaintiff's money and his service as a member of the firm. The bill originally alleged that upon a statement of the accounts being made by the clerk of the firm, that they agreed that if any error should be discovered that they would mutually correct it.

The plaintiff's bill alleged that on the evening of the day on which the contract of dissolution was signed by the parties, that a mistake was discovered by the accountant, by which the plaintiff had lost, by the terms of the statement, four thousand and thirty-six dollars and twelve cents. That on the attention of the defendant being called to the alleged error, that he promised to re-examine the account and correct the error. But that he had failed and refused to do so. Whereupon the plaintiff filed his bill for the purpose of compelling the correction of the alleged error. The case coming on to be heard, defendant, by his counsel, filed a demurrer to plaintiff's bill; on the ground that the plaintiff had his remedy in a common law action upon defendant's promise, which demurrer was sustained. Plaintiff then obtained leave to amend his said bill, which he did by erasing the alleged promise. Defendant filed a demurrer to the amended bill, which was overruled and defendant required to answer, which ruling defendant excepted to, and is assigned as error.

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A special master was appointed to take testimony and report to the court, to which exception was taken, on the ground that no replication had been filed to defendant's answer; the parties, however, agreed upon the special master. The master gave notice and the parties met and took their testimony, and the master made his report, in which he found the whole amount of plaintiff's claim to be due and owing by defendant. The plaintiff then filed his replication as of the preceding term. And the court awarded a decree in accordance with the special master's finding, to all of which the defendant's counsel duly excepted, and presented their bill of exceptions to this court in the form of a petition in error, assigning a large number of errors, many of which it will not be necessary to examine.

The first error assigned is as follows: Because the amended bill was not properly made and left the bill as amended without being sworn to; because when the court made the order, the defendant under the statute was entitled to notice of the filing of the amended bill, said notice to be served on him; and after receiving such notice was not bound to file an answer until the fifth Monday thereafter, but neither the notice nor time was given.

2. That the court below erred in overruling defendant's demurrer to the amended bill.

3. That the court erred in referring the case to a special master, when on the pleadings there was no issue of fact upon which evidence should be taken, there being no replication on file in the case at the time. Besides, no authority can be given to a master, in this territory, to report findings of fact from evidence taken before him: See Code of Civil Proceedings, 1869, section 759.

4. That the court erred in permitting the complainant to file a replication after the evidence was all taken, and the case ready for hearing and argument on the report of the master and the evidence, and cites: Daniels' Chan. Pl. and Pr. 826; *Childs v. Horr*, 1 Clark's Iowa R. 432; *Rogers v. Mitchell*, 41 N. H. 154; *Pierce v. West*, 1 Peters, C. C. R.

531; *Pickett v. Chilton*, 5 Minn. 467; *Scott v. Clarkson*, 1 Bibb.; 1 Ren. 277.

5. That the court erred in confirming the report of the special master and entering a decree for the complainant in the case.

The plaintiff's bill as originally filed clearly presented grounds for a common law action in assumpsit upon a new promise, made after the signing of the contract for a dissolution of the partnership which had existed between the parties to the suit; and the amendment to the bill being made by a simple erasure of the allegation, which gave jurisdiction to a common law court, we think was not such an alteration as changed the jurisdiction from a court of law to that of a court of chancery; hence if the plaintiff had his remedy in a court of law, the defendant's second demurrer should have been sustained for want of jurisdiction in a court of equity. If this is a correct view of the case, it would be sufficient to justify a dismissal of plaintiff's bill without examining any of the subsequent errors complained of. But whether this is so or not, we are clearly of the opinion that the court erred in compelling the defendant to answer the plaintiff's bill without allowing him the time provided by the statutes of this territory: See laws of 1873, sections 667-8.

Another error complained of is, that there was no engrossment of the amended bill, nor was the bill as amended sworn to. The nature of the amendment being simply certain erasures of the allegations of the original bill, it may be contended that it was not necessary that the bill as amended be sworn to, inasmuch as there was no new matter set out; but the statute requires not only that the bill should be sworn to, but that the defendant was entitled to the time given to answer, viz: the fifth Monday after the amendment to the bill was filed.

These errors might be cured by sending the case back to the district court, but we are of the opinion that the plaintiff being entitled to bring his action in assumpsit in a court

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of law, he can have no jurisdiction in a court of equity, and that he cannot obtain jurisdiction in such court by simply erasing a substantial allegation from his bill. Another error complained of is, that the case was referred to a master to take testimony before any replication was filed, and consequently before the case was at issue, but the record does not show that the question was raised at the time that the application was made for the appointment of the special master. It was, however, raised at the time that the master met the parties for the purpose of taking the testimony, and so noted on the record. The record shows that the special master not only heard and reported the evidence to the court, but that he passed judicially upon various questions which arose during the hearing, and presented a finding upon the facts proven. 'This was beyond the power of the special master, by the provisions of the code of Wyoming. The duties of a special master are to simply take the testimony and report the facts to the court for its action, and not to return his findings upon the evidence.

The plaintiff's bill allowing that a board of equity had jurisdiction is defective, in the fact that the action was based upon the alleged wrongful statement of an account between the parties; therefore the first prayer of the bill should have been to have the statement opened, with leave either to surcharge, falsify or correct in some particular, and the particular item, or items, of the account to be amended should be pointed out, so that the chancellor might readily see wherein the statement was defective; none of these things are prayed for in plaintiff's bill. The plaintiff comes into court asking the correction of the statements specified in the contract, but proceeds to set up and prove a contract entirely different from the one on which the action is based; and although the amended bill strikes out the alleged promises on the part of the defendant to correct any errors which might be discovered by a re-examination of the accounts between the parties, yet a large

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portion of the evidence goes to the maintenance of such a promise ; hence the testimony, or at least a large portion of it, is not responsive to the allegations of the bill. Finding the bill thus defective and uncertain in so many particulars we might send it back to the court below for correction. But finding the plaintiff has a clear remedy in a common law court, this court, if that be so, can have no jurisdiction. We are constrained to refer the plaintiff to his remedy at law, and dismiss the bill.

Bill dismissed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
MARCH TERM, 1875.

DOLÁN *v.* CHURCH ET AL.

PRACTICE.—An application for change of judge, under the provisions of the statutes of the territory of Wyoming, must be made in the cause before it is definitely set for trial.

IDEM.—Where the application was made after both parties had consented in open court that the trial of the cause should be set down for a day certain; *Held*, that it was too late to make such application, and that the moving party had waived his rights therein.

IDEM.—In order to have an error considered by the supreme court it must be properly assigned as an error, and presented on a motion for a new trial in the court below.

ERROR to Laramie County.

A sufficient statement of this case is contained in the opinion.

Thomas J. Street, for plaintiff in error.

On November 28th, 1873, the plaintiff sued the defendant in an action of replevin to recover the possession of thirty-

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two and a half tons of hay, of the value of thirteen dollars per ton, alleged to be unlawfully detained: See record, pages 1, 2, 3. The defendants answered general denial and plea of property in defendants: See record, pages 5 and 6. Then on the sixth of February, 1874, at the adjourned November term of said court, this cause coming on for trial, the plaintiff filed an affidavit for a change of judge (see record, page 8), which was overruled, and the defendants introduced their testimony, and the jury found generally for the defendants in the sum of two hundred and sixty dollars. A motion for new trial was duly made and overruled (record, pages 11 and 12), and judgment rendered for defendants on the verdict: Record, pages 15 and 16. The case comes to this court on petition in error. We allege as error:

I. The refusal of the court to grant a change of judge as prayed for: Laws Wyoming, 1869, 517, 559; Organic Act Wyoming Territory.

II. Because of the error of the court in overruling the motion for a new trial.

III. Because the court erred in pronouncing judgment on the verdict. The verdict was not in proper form and will not support the judgment. In replevin the verdict must conform to the statute: Laws Wyoming, 1869, 543, sec. 195; Id. 1873, 54, sec. 180; Powell on App. Proc. 145; 7 Ohio, 232; 2 Nash, 828, 829.

W. W. Corlett, for defendant in error.

The sole error relied upon in this case for a reversal of judgment is that the district court erred in overruling the motion of the plaintiff in the case for a change of venue upon the affidavit of the plaintiff filed for that purpose. From the bill of exceptions (page 7) it appears that the cause, by consent of both parties, was set down for trial on the sixth day of February, 1874, and having been so set for trial on that day, afterwards the said motion for a change of venue was interposed. The court overruled the motion, simply because it was made too late.

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As it was agreed to try the case on February 6, 1874, before any change of venue was asked for, it was necessarily an agreement to try the case in the court where it was pending. By so agreeing the plaintiff waived his right to a change of venue. The statute allowing the change to be made is solely for the benefit of the party asking therefor. Hence, the right is one which the party can waive. On these points see Broom's Leg. Max. 136-7-8, 699, 700, 701; also see Laws of Wyoming, 1873, 163.

The argument for the defendants is simply this: The right of the plaintiff to have a change of venue was a right personal to himself, in which no one else had any interest; therefore he could waive that right by first making an agreement, in the face of the court, to try the case in that court on a certain day, because to change the venue afterwards would be to repudiate the agreement so made.

By the Court, THOMAS J.: The petition in error in this case alleges but two rulings in the district court which are claimed to be erroneous.

The first is that the court refused to grant a change of judge, as provided for by the laws of Wyoming territory, the plaintiff having applied therefor and filed the usual affidavit. It appears by the bill of exceptions that by consent of parties this cause was set down for trial the sixth day of February, 1874, and that after the time of trial had so been fixed the plaintiff interposed his motion for the change of judge. We are of the opinion that while, in ordinary cases, a party, on a proper showing, has a right to such change of judge, yet that a motion of this nature should be made promptly in due season, and certainly not for the sole purpose of causing delay, and that in this case the plaintiff, by omitting to file his affidavit until after he had consented to have the trial of the cause fixed for a day certain, and the cause had been called on that day, thereby waived his rights under the statute which provides for a change of judge, unless the party so applying has just learned that facts exist

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from which he believes that a judge may be prejudiced against him, which facts should be alleged in the affidavit.

The second error alleged cannot be considered by this court, as it was neither assigned nor argued as error upon the motion for a new trial in the court below.

The decision of the district court is affirmed.

HELLMAN & CO. v. WRIGHT & CO.

PRACTICE.—Under the provisions of the code of procedure of the territory of Wyoming all objections, except those for incompetency and irrelevancy, must be raised by motion before the commencement of the trial.

IDEM.—Objections, however, for the two reasons mentioned, should be made on the trial, and the fact that the court has previously refused to suppress such depositions on motion is no bar to the question being again raised as to their incompetency and irrelevancy.

IDEM.—Where the plaintiff had introduced his evidence and had rested, but subsequently offered the statutes of Nebraska in evidence: *Held*, that the admission of the same, or of other testimony, was entirely at the discretion of the court, and that the refusal to admit further evidence at that time was no error.

ERROR to the First District Court for Laramie County.

A full statement of this case is contained in the opinion of the chief justice.

D. McLaughlin, for plaintiff in error, cites: Code of Wyoming, 389; 4 Abb. N. Y. Dig. 93; *Peel v. Elliot*, 16 How. 483; *Dolfus v. French*, 5 Hill, 493; *Powell v. Tuttle*, 10 Paige, 523; *Mitchell v. Allen*, 12 Wend. 290; 38 N. Y. 355, 361, 378, 385; 1 Greenleaf on Evidence, 381, 50; secs. 111, 112 and 117; 2 Id. 484; 1 Parsons, 175; 43 Barb. 435; 51 Id. 616; Pars. on Part. 72–88, 120; 1 Phil. Ev. 466; *Conklin v. Barton*, 43 Barb. 435; Stackie on Evidence, 76.

E. P. Johnson, for defendant in error, cites: 1 Phil. on Ev. 497; 1 Greenl. 177; Parsons on Partnership, 194, 185; 2

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Washington C. C. Repts. 388; 10 Johnson, 66; 7 Wendell, 216; 6 Pick. 464; 5 Id. 414; 9 Cushing, 255, 323; 9 Metcalf, 544; 2 Greenleaf, 482; 1 Smith's Lead. Cas. 1190; 2 Nash, 1045.

By the Court, FISHER, C. J.: On the tenth of December, A. D. 1872, the firm of Wright & Co., who were engaged in a trading business in the city of Omaha, in the state of Nebraska, made their promissory note, payable to their own order at the First National Bank of Omaha, for one hundred and twenty-seven dollars and thirty cents, in eighteen days from the date thereof. When said note became due it was not paid. The plaintiffs in error, who were the plaintiffs below, brought a suit against Wright & Co. in the district court of the first judicial district of Wyoming territory, to the July term, A. D. 1873, and at the same time issued an attachment and attached a large lot of goods which were in a store kept in the city of Cheyenne by one George L. Wright, whom the plaintiffs alleged was a member of the firm of Wright & Co.

On the trial of the case in the district court, evidence was produced on the part of the plaintiffs going to establish the fact as alleged, and on the part of defendant denying the allegation. This question was submitted by the court (Justice Carey presiding) to the jury, to find whether or not George L. Wright was a member of the firm of Wright & Co. at the time the note was given, and find accordingly. The jury found for defendants, and in their verdict embodied a special finding that George L. Wright was not a member of the firm of Wright & Co. A motion was filed for a new trial, and a long list of exceptions filed, all of which, after argument, were overruled, and a new trial refused. After this a motion was entered for a new trial upon the ground of newly discovered evidence. Previously to this, however, the defendants had filed a motion to suppress portions of certain depositions taken by the plaintiffs to be read in evidence on the trial, on the grounds of incompetency and

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irrelevancy, which motion after argument was overruled by C. J. Fisher, who was at the time presiding. The last motion filed by plaintiffs was also overruled. The plaintiffs then brought the case to this court, assigning a long list of exceptions, the first of which was not insisted upon; the second was: "That the court erred in sustaining the objections made by defendants to a part of the depositions of Jacob Solomon, on the ground of incompetency and irrelevancy, when the same was offered in evidence by the plaintiff, and that it was error in the court to entertain such objections, they having been previously passed upon by the court at the instance of the defendants."

The list of errors assigned from the second to the eleventh inclusive, are of the same nature, and are to be considered by the same rules. The next error complained of is, "That the court erred in not permitting the plaintiffs to give in evidence the laws of the state of Nebraska to prove the rate of interest in that state." The next errors complained of, including instructions 12, 13, 14, 15, 16, 17, 18 and 19, asked for by plaintiffs, not having been given to the jury as requested by plaintiffs.

The plaintiffs further assign as error the fact that the court erred "In overruling their motion requiring all instructions requested by defendants to be given or refused by the court before the commencement of the argument." The other errors complained of were certain instructions given to the jury by the court by which the jury was misled. And also that the verdict is not in accordance with the law and the evidence, and that a new trial was not granted.

The record in this case shows that a motion was made by the counsel for defendants in the court below, previous to the commencement of the trial, to suppress parts of certain depositions taken by plaintiffs to be read on the trial of the case, on account of incompetency and irrelevancy, and which motion was very properly overruled because the court could not sustain such a motion at that time, as the question of their competency and relevancy could only be determined

by the other evidence as it might arise in the progress of the trial; but the refusal of the court to suppress said depositions at that time did not in itself determine that the motion should not be again properly made and sustained. But even if such had been the result of the ruling on the plaintiff's motion, we can see no good reason why the court could not modify or even reverse its ruling, and that, too, notwithstanding there had been a change of judges. But upon an examination of the parts of the depositions refused, we are fully of the opinion that the action of the court in sustaining the motion at the time was eminently proper. All the portions of the depositions bearing upon the question, as to whether George L. Wright was a member of the firm of Wright & Co., which could be given under any known rules of evidence was admitted, and the only part denied was the statements of the other members, or alleged members of the firm, and of other persons not in any way connected with it, and whose statements could not in any way bind George L. Wright. Hence, we find no error under this exception, and the nine following ones being of a precisely similar character must be disposed of in the same manner.

The next question requiring our attention is contained in the twelfth exception assigned, viz: That the court erred in excluding the laws of Nebraska when offered in evidence by the plaintiffs to prove the rate of interest in that state. The record shows the offer was not made until the testimony of the plaintiffs had been heard and they had closed, and that on the part of the defense had also closed; when no evidence except in rebuttal could be given, except by consent of the parties or by the discretion of the court, and therefore there is no error for this court to correct. The balance of the errors complained of consists of complaints touching instructions given and others refused, but as we fail to find in those given anything which could by any possibility mislead the jury, we find nothing to correct. And as to instructions refused, reviewing courts will seldom interfere with a mat-

Argument for Appellees.

ter which is so entirely within the discretion of the court. We, therefore, after a full and careful examination of the whole record, have arrived at the conclusion that substantial justice has been done, so far, at least, as the rulings of the court below are concerned, that we think we ought not to interfere.

The judgment is therefore affirmed.

WAGNER AND DUNBAR, APPELLANTS, v. HARRIS
ET AL.

LEGISLATIVE POWERS—MUNICIPAL CORPORATIONS.—The legislative assemblies of Wyoming and other territories, although not in possession of sovereign powers, have authority under various acts of congress to create municipal corporations, and to grant charters to the same.

APPEAL from the Second District Court, Albany County.

A sufficient statement of the case is contained in the opinion of the Court.

J. W. Kingman, for appellants, contended that the legislative assembly of a territory not possessing sovereign powers could not create municipal corporations, nor grant them the authority to pass and enforce by-laws and ordinances, levy taxes, and to perform other duties incumbent upon such corporations.

E. P. Johnson and M. C. Brown, for appellees, presented the following arguments and citations:

This case comes up from the second district on appeal. Plaintiffs in appeal were plaintiffs below. It is a case in equity, being a bill for an injunction to restrain defendants from exercising their functions as trustees of the town of Laramie City under the charter of said city, passed by the third legislative assembly of the territory. The basis of

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the complaint is the alleged illegality of the legislative action in granting the charter, by reason of its being the exercise of power not possessed by the legislature under the laws of congress and an act in violation of those laws.

That the action of the defendants, under the charter as trustees of said city, in levying taxes, making ordinances, creating a police, etc., are unauthorized by law and are injurious and oppressive to the people. On that account and for that reason it is submitted by defendants:

I. That the bill does not seek to have any specific or particular act or threatened act enjoined as one calculated to work irreparable injury or cast a cloud upon real estate, or as coming under any special head of equitable jurisdiction, but simply seeks to stop the whole machinery of the municipal government of Laramie City, for the reason that the legislature exceeded its power in calling it into existence. And the acts complained of in the bill are set out to invoke the protection of a court of equity in favor of complainants and all those in whose behalf they appear, on the theory that they are injurious and should be restrained on account of their illegality, and their illegality is based on the alleged illegal action of the legislature. Now, if it be true that the act of the legislature was wholly void and that all the pretensions, actions, and doings of the defendants as trustees are absolutely without authority and void, then it is only necessary for that allegation to appear on the face of the bill to make it necessary for the court to refuse the relief and dismiss the bill for want of equity, as there is an adequate remedy at law. If what is stated is true, defendants and all their agents are simply trespassers in all matters complained of, and remedy at law is complete: High. on Injunc. sec. 354; *Blake v. Brooklin*, 26 Barber, 101; Hill. on Injunc. sec. 23, p. 458 *et seq.*; 1 Ohio St. 59; *Mechanics v. Debolt*, 25 N. Y. 312; 3 Ohio St. 1; 2 Dill. on Mun. Corp. secs. 727, 770.

II. It is, however, claimed that the legislature, in granting the charter, violated the act of congress approved March

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2, 1867, as also the organic act of the territory. The act of March 2, 1867, in express terms refers only to private corporations and special privileges to associations of citizens for any purpose, and has no reference to municipal corporations: 14 Stats. at Large, 426. If there was any doubt on that point it would be dispelled by the amendment to that act: 17 Stats. at Large, 390. It is a sufficient answer to the position that the act of the legislature is in conflict with the organic act, to refer to Dill. on Mun. Corp. sec. 18, and cases there cited.

III. Should it be claimed or argued that the officers of the corporation have acted illegally, or failed to act in conformity with the authority conferred by a valid charter (although it is not conceded that such a question arises in this case), it may be answered that there is a remedy by *mandamus* or *certiorari*, or other action at law, to compel a compliance with the provisions of the charter and ordinances: 1 Dill. Mun. Corp. secs. 665, 751, 752, 739 and 741.

By Court, CAREY, J. This was a bill of complaint filed in the district court, by complainants, appellants in this court, praying that William Harris, J. H. Finfrod, R. Galbraith, James Vine and T. J. Webster (trustees of Laramie city), defendants, their agents, attorneys, solicitors and officers might be perpetually enjoined from proceeding further to act as a corporation (under an act of the third legislative assembly of Wyoming, approved December 12, 1873, entitled "an act to incorporate Laramie city"), to make laws, by-laws or ordinances, or to affix penalties thereto, or to assess taxes, or to attempt to collect the same, or to contract debts, or issue warrants or promises to pay, or collect licenses, or issue warrants in civil cases, and imprison parties for non-payment of judgments therein, and especially from attempting to collect the tax of ten mills on the dollar assessed on the personal property of the town of Laramie for the year 1874-1875. Though various questions were incidentally presented in the court below, it appears from

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the bill of complaint and the decision filed, that the only questions relied on and considered by the court were those that went to the legality of the Laramie city government, under the law incorporating said city: Laws 1873, 201 *et seq.* We will consider these questions as follows:

1. Is the establishment of a municipal corporation a rightful subject of legislation?

2. Is the authority to establish a municipal corporation vested in the territorial legislature? If so, is the statute incorporating the city of Laramie consistent with the organic act of the territory, the constitution of the United States, and the laws of the United States applicable to the territory?

Upon the first of these questions there can be no doubt. The creation of municipal corporations has been recognized as a rightful subject of legislation by the supreme court of the United States, and we believe by the highest courts of almost every state of the union. Probably there is not a state but what the legislature of which has from time to time exercised such powers undisputed. In some of the states these corporations are created under general laws, while in other states they are created by special charters. In England, since the passage of the municipal corporation act in 1835, municipal corporations have been the creatures of legislative enactments; and in this country, says Judge Dillon, the proposition which lies at the very foundation of the laws of corporations, is that all corporations, public and private, exist and can exist only by express legislative enactment, creating or authorizing the creation of the corporate body: Dillon on Municipal Corporations, sec. 17 *et seq.*

We now come to the consideration of the question whether the authority to create municipal corporations is vested in the territorial legislature. It is no longer doubted that over all territory acquired by treaty or conquest congress has exclusive and universal power, and their legislation is subject to no control, save treaty stipulations and

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personal rights and rights of citizenship guaranteed by the constitution. Such territory is not within the jurisdiction of any state, and is necessarily under the jurisdiction of the United States, otherwise it would be without any government at all: *Amer. Ins. Co. v. Carter*, S. C., 1 Pet. 511; *Dred Scott*, 19 How. U. S. 393; 1 Kent, 384; Story's Const. 1322 *et seq.*

Congress possessing the power of sovereignty may enact whatever form of government in the territories they deem best. It is wholly in their discretion what powers—legislative, judicial and executive—shall be conferred upon a territorial government. This discretion of congress has been exercised with wisdom and liberality, and they have from time to time conferred more extended powers to the people of the territories. In the organization of the territory north-west of the Ohio river, the legislative power was vested temporarily in the governor and judges of said territory. In the organization of the territory of Orleans, which became the state of Louisiana, the legislative power was vested in the governor and a council, appointed by the president. Until the organization of the territory of Wisconsin various modes were adopted for the several territories created. The Wisconsin organic act appears to have been the matured system for the government of territories, as all territorial organic acts enacted since are but copies of the Wisconsin act. The whole legislation of congress in reference to the territories shows that the policy and theory of congress in the organization of territories have been to leave all the powers of self-government with the people of such territories, consistent with the supreme and supervisory power of the general government, and to admit such territories as soon as they possessed the requisite constitutional requirements as states, on an equal footing with the original states: Cooley's Cons. Lim. 31; *Clinton v. Englebrecht*, 13 Wallace, U. S. R. 434.

After a careful examination, we find that the restrictions placed upon the legislative power of this territory are as

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few as those placed upon the legislative powers of most of the states of the union. The sixth section of the organic act of the territory provides, "That the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this organic act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States, nor shall lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the rights of private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property shall be taxed in proportion to its value."

Congress has from time to time enacted certain general laws in reference to the territories, among which are laws in reference to slavery and polygamy in the territories, and a statute providing that the legislative assemblies of the several territories of the United States shall not grant private charters or special privileges, but that they may by general incorporation acts permit persons to associate themselves together as bodies corporate, for mining, manufacturing, and other industrial pursuits. We are unable to find any prohibition in the organic act, or other acts of congress, or in the constitution of the United States, upon the legislative assembly of this territory in creating municipal corporations: 14 Statutes at Large, 426. By section fifteen of the organic act, these laws are extended to this territory. We are referred to the act of congress prohibiting the legislature from granting private charters, etc., but this act does not bear upon the question under consideration, as the corporation of Laramie city is a public corporation.

Again, it is solemnly argued that a territory possessing no sovereign power cannot create municipal corporations: that the board of trustees of said Laramie city are authorized to exercise legislative powers which are by the organic act vested in the legislative assembly and governor of the terri-

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tory. While the making of ordinances and by-laws by the trustees of said city may be the exercise of a certain kind of legislative power, we do not consider it the exercise of any part of the legislative power vested in the legislative assembly and governor of the territory; nor do we consider that it requires sovereign power to create a public corporation, any more than a private one; and that a territorial legislature did possess the power to create private corporations before the passage of the act of March 2, 1867, (14 Statutes at Large, 426), is recognized by said act, and was expressly decided by the supreme court of the United States in the case of *Vincennes University v. Indiana*, 14 Howe, 268. The same act of March 2, 1867, does not prevent the existence of private corporations in the territories, but it provides that they shall be organized under general laws and not created by private charters. We do not see how the question of sovereignty can arise in the determining of the questions presented. The powers of the legislature are such as are conferred by congress. Congress has conferred upon the territorial legislature the power to legislate on all rightful subjects of legislation, with certain restrictions and exceptions, and the legislative power to create municipal corporations does not fall within the restrictions and exceptions.

We cannot see why the same rules in determining what are rightful subjects of legislation should not apply in the territories that apply in the states. In a state a legislature can legislate upon all rightful subjects of legislation consistent with the constitution of such state and the constitution of the United States, and in a territory of the organic and other acts of congress. By an examination of the constitutions of a number of the states we find substantially the same provisions in reference to the legislative powers of such states as are contained in the organic act of this territory in reference to the legislative powers of such territory. The powers of such states to create municipal corporations, with officers authorized to make by-laws and or-

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clinations, has not been doubted; nor has it been held that such officers exercise any portion of the legislative power vested in such state legislatures: Dill. on Mun. Corp. sec. 18; 2 Kansas, 445; 2 Id. 454; 1 Colorado, 323.

Again, it is within the power of congress to annul any territorial law. While congress has time and again exercised this power, we have been unable to find an instance where congress has annulled a law of a territory creating a municipal corporation. Congress has by various acts recognized municipal corporations in the territories, and by the passage of a recent act granting certain lands to the city of Cheyenne for water purposes, recognized the corporate authorities of said city. It is, therefore, no unreasonable inference that the power of territorial legislatures to create municipal corporations is recognized and approved by congress.

The remaining question which we are called upon to consider is, whether the charter in question is consistent with the provisions of the organic act. While the charter is ambiguous and uncertain in many respects, most of its provisions are consistent with the organic act; but we do not feel called upon under the record to construe its various provisions. The sixteenth subdivision of section 18 of said charter provides that the by-laws, ordinances and regulations of said city shall not be repugnant to the laws or organic act of the territory, and if this provision is violated a court of equity or law will furnish relief or a remedy when the matter is properly presented to the court.

Thus, that the passage of the charter was unwise and impolitic we are not called upon to decide. The courts will not declare a law or any portion of a law unconstitutional unless its opposition to the fundamental law is clear and plain. To justify a court in pronouncing an act of the legislature to be unconstitutional the incompatibility must not be speculative, argumentative, or to be found only in hypothetical cases or in supposed consequences; it must be clear, decided and inevitable, such as presents a contradiction at once to the mind, without straining either by forced mean-

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ings or too remote consequences: 7 Pet. 633; 2 McLane, 195.

For the foregoing reasons the decree of the district court is affirmed.

BROWN v. ILGES.

JURISDICTION OF UNITED STATES COURTS.—Military reservations within the territory of Wyoming are solely under the jurisdiction of the United States.

IDEM.—Where stock was roaming over a reservation, contrary to the provisions of the general orders of the commanding officer, and such stock was seized by a subordinate officer of the United States, in accordance with such general orders: *Held*, 1. That such commanding officer had the authority to make and enforce the general orders; 2. That the owner of such stock could not maintain a civil action for damages against the subordinate officer who executed the general orders.

IDEM.—A party will not be heard to allege error which, if it exists at all, is in his own favor.

POSITIVE INSTRUCTIONS.—Where the material facts upon the trial of a cause are undisputed, the court not only may but should give positive instructions.

ERROR to the First District Court for Laramie County.

This case was originally commenced in replevin before a justice of the peace at Fort Laramie, taken from him, by change of venue, to a justice of the peace at Cheyenne, who gave judgment for plaintiff. The defendant appealed to the district court, where judgment was rendered for the defendant, and the case came up from that court. The defendant was an officer in the United States army stationed at the fort. There was a dispute as to the ownership of the property replevied, but it appeared that the plaintiff resided near the military reservation, and that the hogs in question were in the habit of running on the reservation. That the same was contrary to "general orders," and the plaintiff was notified to keep them from the fort. Upon his failure so to

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do the hogs were taken up under a general order from the post-commander, and defendant then, as officer of the day, under the direction of the post commander, refused to deliver the property to the plaintiff, and did not do so, nor permit the officer having the writ to take the property until so directed by the post-commander. On the trial the court instructed the jury to find for the defendant.

W. H. Miller and Thomas J. Street, for plaintiff in error, contended that the district court erred in charging the jury to find for the defendant, and that the court, in giving an alleged state of facts to the jury, had erred in so doing and had assumed the functions of the jury.

E. P. Johnson, for defendants in error.

I. Of the instructions. Plaintiff does not attempt to maintain that the instructions are erroneous so far as the statement of the law is concerned, but only because the facts are assumed, as is alleged, and by the positive instruction the province of the jury was invaded. It cannot be said that the court acted upon assumption, merely because the facts that were decisive of the controversy were undisputed; so there was nothing for the jury to act upon, their province being simply to weigh testimony. Where the facts are undisputed, the court not only may but should give positive instructions: *Hill. New Trials*, 221-2-3, 225; *Pratt v. Hull*, 13 John. 334; *Stuard v. Simpson*, 1 Wend. 378; *Rich v. Rich*, 6 Wend. 663.

II. It is complained that the verdict is not in the form required by law, in answer to which it is said: 1. That special findings as to the right of property or right of possession is required only when one or the other, or both, are claimed by defendant. In this case defendant claimed neither; so that in the event of a finding for the defendant no damages other than normal could be given. The reason for special findings, therefore, fails; 2. If, under the evi-

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dence and the law, defendant was entitled to recover, he was entitled to nominal damages at least, and if the jury failed to make special findings that entitled him to more, it was an error in plaintiff's favor, and of which the defendant alone could complain. A party will not be heard to allege error which, if it exists at all, is in his favor and does not prejudice him: Nash Pl. & Pr. 689; Powell on App. Pr. 189. But the above assignment of error cannot avail, as it was not presented on motion for a new trial. The rule on that subject in this court is well settled. The motion for a new trial was heard on the ground that the verdict was contrary to law, but no objection was taken as to its form.

By the Court, THOMAS, J. The chief error alleged by the plaintiff, is the instruction given to the jury by the judge of the district court, to the effect that it was not necessary for them to pass upon all the points raised by the defendant in the case, and many of the material facts being undisputed, as there was one point presented which must prove fatal to the plaintiff's claim, viz: that the property in question had been taken in pursuance of the general orders of the officer in command at Fort Laramie, to whom the defendant was subordinate; and that in a United States post and upon a United States military reservation, while the commanding officer had no jurisdiction over the persons of civilians, yet had a right to promulgate and enforce strict police regulations, and that if civilians resided upon military reservations, and allowed their stock to roam at will over the same, they must do it subject to such regulations and at their own risk. And that in this case the jury must find for the defendant and assess damages accordingly. We do not deem it necessary to inquire in this case whether the general order issued by the commandant at Fort Laramie was strictly in accordance with the general law of the land, or whether he had any right to absolutely confiscate stock roaming at large about the post. There can be no question, especially as these

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reservations are solely under the jurisdiction of the United States, that an officer in command of a military station, has at least, an equal right with our town and village governments to impound and dispose, by settled rules and regulations, of animals running at large, and at least to retain possession of them until the owner of them enters into some satisfactory and binding arrangement or agreement in reference to the same. In this case, it appears that the swine in question were not confiscated, but were detained by order of Major Blount, commanding at Fort Laramie. We are, therefore, unable to see any material error in the charge of said judge, or that any injustice was done to the plaintiff by reason thereof, especially as there are two other questions, which, though not brought up on the argument of this case, would effectually dispose of the plaintiff's claim herein :

1. That the defendant, an officer of the United States Army, was acting in strict accordance with the commands of his superior officer, upon which superior officer the demand for the property should have been made, instead of upon this defendant.

2. That the justice of the peace before which the suit was commenced, and who issued the writ of replevin herein, and the one before whom said case was tried, had no jurisdiction over the military reservation at Fort Laramie.

The judgment of the district court is affirmed.

Argument for Plaintiff in Error.

DUNN v. HEREFORD.

WORK, LABOR AND SERVICES.—The court below having charged the jury that if defendant hired plaintiff for one month at a stipulated sum, and discharged him before the expiration of the month without sufficient cause, defendant was bound to pay plaintiff for the full month, or that if defendant discharged plaintiff before the time agreed upon had expired, at a great distance from home and in an uninhabited country, that defendant was bound to settle with plaintiff and pay him the amount found to be due: *Held*, that such charge was not erroneous.

ERROR to the First District Court for Laramie County.

As this cause was, by consent of parties, submitted upon the brief of the plaintiff in error, and it contains also a statement of the case, it is given here in full. Upon an examination of the record, however, it is found that the testimony was contradictory in every material question.

E. P. Johnson, for plaintiff in error.

This is a case originally commenced by defendant in error in the justices' court to recover \$59.10, balance due him from plaintiff in error on account for services performed by him as night-herder. The defense set up, was that a portion of the indebtedness claimed arose after defendant was discharged from plaintiff's employ; and that defendant was employed as night-herder, and that he willfully abandoned the cattle during the night and allowed them to stray and get lost. That this violation of his contract occurred on several occasions on each of which the train was delayed and prevented from moving to the damage of plaintiff of one hundred dollars. On trial of the cause before the justice, defendant recovered judgment and the case was appealed to the district court of Laramie county, and comes up here from that court for review. It is submitted that the evidence discloses the following facts:

Dunn was proprietor of a freight train between Cheyenne and Fort Laramie and the Indian agencies. That he employed Hereford to act as night-herder at fifty dollars per

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month; that as such night-herder his duties were to take the cattle, keep them together during the night, and have them in for duty in the morning; that he was in the habit of going to bed nights, causing loss of the cattle and delay in the movement of the train; that he was caught in the act on the second trip and discharged, and one Mansfield employed in his stead; that he stayed with the train from the time of his discharge to the agency and back to Cheyenne, doing no work for Dunn, but charging that time, fifteen days, to Dunn in the account sued on; that he drew his money in installments as he needed it, and when he left Cheyenne on the second trip had in that manner received seven dollars more than was due him; that the direct loss shown by his willful neglect of duty as night-herder amounted to nearly \$300. There are a number of errors assigned, but those chiefly relate to one, and are: 1. The giving of the instructions to the jury; 2. The refusal to give those requested by plaintiff in error; 3. The overruling the motion for a new trial.

I. The instructions to the jury involve three propositions of law, each of which are erroneously stated, especially as applied to this case: 1. The first proposition is that Dunn, having settled with Hereford for the first trip, and overpaid him seven dollars without having interposed a claim for damages occasioned by Hereford's neglect on that trip, Dunn could not afterward set the claim up and recover it. Now, it is urged that the above proposition was error: First, because it informs the jury that a fact has been proven, and assumes that Dunn had a settlement and paid for prior services with a knowledge of the counter-claim he might have set up, whereas it appears, and was shown by Dunn's testimony, that he did not find out that Hereford caused the trouble until he arrived at Running-water, on the second trip; Second, it assumes that Dunn and Hereford had a settlement, whereas it appears that Hereford simply drew money when he wanted it, and had at that time overdrawn his wages. Such positive instructions are erroneous, where there is evi-

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dence on both sides, the questions of fact should be left to the jury: 3 Gra. & Wat. on New Trials, 738-763; 19 Wend. 402; 16 Id. 663; but strictly and chiefly because the legal proposition as there laid down, independent of the facts, is an error. Many matters of difference may exist between parties, and the adjustment of any of them does not estop either party from asserting their rights in others, unless those others are included and settled. The instruction was not warranted, on the ground that there was an estoppel: Bigelow on Estoppel, 480; nor on the ground of an account stated. If so, it was only *prima facie* not a conclusive bar: 3 Phil. on Ev. 430-1.

2. The second proposition is that Dunn could not discharge plaintiff at Running-water without paying him off. Acting upon that instruction the jury were compelled to allow Hereford wages for fifteen days, during which time he did no work for Dunn. While an employee may recover sometimes for work already performed, even though discharged for cause, yet it has never been held that the right of action for wages due gave him also the privilege of considering himself in his master's employ until the claim was paid. According to the law, as given to the jury in that instruction, Hereford is still in Dunn's employ, and has only to insist on his pay as an employee to the present moment to recover. The error is so obvious and material in this case that reference to authority seems a work of supererogation.

3. The third proposition assumes that Hereford's statement concerning the character of a storm is true, and that he was justified in abandoning post by reason thereof. Its tendency is to influence the jury to take his statement as conclusive against the testimony of all the other witnesses, who did not seem to be aware that such a storm had an existence there at that time. Even if such was the fact the hardship did not excuse him from the performance of his contract: 2 Pars. Con. 672-6.

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II. It is also claimed that the court erred in refusing instructions asked by plaintiff in error:

1. Because instruction one is to the effect that one, failing willfully or negligently to fulfill the obligations of his contract, is responsible for damages resulting from such failure, embodies correctly the law on that subject: 3 Par. on Con. 180, notes V. & W. 218; Sedg. on Dam. 44, 492.

2. The court also erred in refusing the second instruction asked, to the effect that an employer may discharge his employee for neglecting or refusing to do his duty, or in other words, for cause, and not be liable to him for wages thereafter: 2 Par. on Con. 40.

III. The court erred in overruling the plaintiff's motion for a new trial. In addition to the reasons heretofore urged, the motion should have prevailed on the fourth and fifth grounds stated in the motion, to wit: the verdict being unsustained by sufficient evidence and contrary to law, and errors in assessing damages. There are fifteen days' wages given in the verdict and in the judgment, which item was entirely unsupported by evidence. Plaintiff admits he did not work for Dunn during that time, but claims he was not discharged. The overwhelming weight of testimony, however, is that he was discharged. If such is the fact, then both grounds were well taken. And if he was discharged for cause, he was not only not entitled to the fifteen days' service or wages, but was not entitled to recover at all: 2 Par. on Con. 40, 676.

Thomas J. Street, for defendant in error.

By the Court, FISHER, C. J.: This was an action brought to this court by petition in error from the district court of Laramie county, and submitted upon the brief of plaintiff in error. The principal errors complained of are as to the instructions of the court below to the jury, which were to the effect that if the plaintiff in error, who was defendant below, hired Hereford, who was plaintiff below, for the term of a month at a stipulated sum, and discharged him before

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the expiration of the month without sufficient cause, he was bound to pay him for the full month; or if he discharged him before the time agreed upon having expired, at a great distance from home and in an uninhabited country, that he was bound to settle with him and pay him the amount found to be due. And after said instruction was given, the whole question was submitted to the jury to pass upon the facts proven.

The jury then found for the plaintiff below the amount of his claim.

We are of the opinion that in this there was no error such as justifies this court in interfering: See 2 Kent, 258-9 and notes.

Judgment affirmed.

REGAN v. JONES.

INDORSEMENT.—Where a joint and several note made by the three defendants to the order of plaintiff and another party, was by that party indorsed and transferred to the plaintiff; *Held*, that the plaintiff alone could bring suit on the note, and that the district court did not err in overruling a demurrer to plaintiff's petition, on the ground that "there was a defect of parties plaintiff."

ERROR to the Third District Court for Uinta County.

The opinion contains a statement of the case.

J. W. Kingman, for plaintiff in error, cites the following authorities: Story on Prom. Notes, secs. 118, 120, 120a, 125; Story on Bills, sec. 197; Byles on Bills, 145; Chit. on Bills, 67; Story on Part. sec. 323; Wyoming Stat. 1873, 27, sec. 23.

H. Garbanati, for defendant in error: The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a

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cause of action: Stat. 1873, 38, sec. 86. By this it appears that there can be but one demurrer to the petition, which must set forth all the grounds of demurrer.

By the Court, CAREY, J.: The petition in the district court alleges that on the eleventh day of January, 1873, C. P. Regan, R. H. Carter and William Crawford, plaintiffs in error, made their certain promissory note of that date, payable in six months from date, in the sum of four hundred dollars, to Charles Jones, the defendant in error in this court, and plaintiff in the court below, and John Haggerty, and delivered the same; and that the said Haggerty did then and there indorse and deliver said promissory note to said Charles Jones, and that no portion of said money due on said note was paid to Charles Jones and John Haggerty before said indorsement, or to Charles Jones since the said indorsement. On the back of the copy of the note, filed with the petition, is indorsed the name of "John Haggerty." To this petition the defendants in the court below interposed a demurrer, and assigned as cause of demurrer:

1. That the indorsement of the note was not such an indorsement as transfers entire interest to the indorsee.
2. That the note was not indorsed by the payer thereof.
3. That the suit is not brought by the real party in interest.

After argument on the demurrer, the district court overruled the demurrer, and it is this ruling of the court that is assigned as error. Section 94 of the Code, Laws 1869, provides in what cases the defendant may file a demurrer; the causes specified being six in number. And section 98 provides that when any of the matters enumerated in section 94 do not appear on the face of the petition, the objection may be taken by answer. It has been repeatedly held in the states that have a code similar to ours, that all objections to a petition not falling within the enumerated causes of demurrer in section 94, must be taken by answer: 5 N. Y. 363; 8 How. 235.

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It does not appear by the demurrer in question under which head of section 94 it was intended to be interposed, except it be under subdivision fourth: "That there is a defect of parties plaintiffs."

The code provides with certain exceptions, and this case does not come within the exceptions that every action must be prosecuted in the name of the real party in interest; and it is contended by the counsel for plaintiff in error that the real party or parties in interest were not the prosecutor in this case. The rule often is cited that when a note is made payable to two persons not partners (as A. and B.) or order, the transfer can only be made by a joint indorsement of them both. This is undoubtedly the rule to make notes and bills payable to order, which are transferable by indorsement, negotiable, but the transfer by delivery is sufficient to enable the holder to sue in his own name: 20 N. Y. 472. No particular form of assignment to transfer a bill or note is required, except to make it negotiable and subject to the law which governs negotiable paper. Such assignment may be in writing or by parol. If Haggerty did not intend to transfer his interest in the note to Jones by his indorsement and delivery of the same, the defendants in the court below could have taken advantage of it in their answer.

Again, it is contended that by the overruling of the demurrer, the defendants in the court below were deprived of the benefit of their offset, but one cannot see how it could deprive them of any of their rights. Section 83 of the code provides that in the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of assignment, but that the section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith upon good consideration before due.

In an action by an assignee, the assignee stands in the place of the assignor, and the defendant may avail himself

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of any defense which he might have interposed had the action been brought by the assignor. The assignee takes the demand, except in the cases excepted by the section, subject to the equities existing between the parties to the contract.

For the foregoing reasons the court sustains the ruling of the court below.

Judgment affirmed.

GREGORY v. MORRIS ET AL.

REPLEVIN.—Where, in an action of replevin, the court refused under the pleadings to permit the defendant to prove title to the property, but permitted the defendant to so amend his answer that the court might admit such evidence: *Held*, that the court did not err in so doing.

IDEM.—The right of possession merely is sufficient to enable a party to maintain an action of replevin.

IDEM.—In a contract between vendor and vendee, which contained a clause to the effect that the right of property should remain in the vendor, with the right to seize the same at any time until the vendee should have complied with the terms of the contract: *Held*, that such clause was valid as between parties, and that an action in replevin could be maintained by the vendor, although possession had been given to the vendee.

IDEM.—Although a general verdict in an action of replevin is not strictly in accordance with the provisions of the code of procedure, yet it is not such an error as to justify the interference of an appellate court, unless it is shown that the plaintiff in error sustained injury thereby.

[This case was affirmed by the supreme court of the United States, in March, 1878.]

ERROR to the Second District Court for Albany County.

The opinion of the chief justice contains a sufficient statement of this case.

W. W. Corlett and M. C. Brown, for plaintiff in error.

I. One of the errors complained of by the plaintiff in error is, that the court below erred in permitting the defend-

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ants to file an amendment to their answer, setting up a new and substantial ground of defense during the trial of the case. On this point see section 148 of Code of Civil Procedure of Wyoming Territory, title "Replevin," Laws of 1869; 2 Greenl. on Ev. sec. 560 *et seq.*

II. The said plaintiff in error moved to set aside the verdict in said case because it was not sustained by sufficient evidence. The court overruled said motion to set aside the verdict and defendant excepted. This was manifestly error, for the reason that the defendant Poteet could not have been damaged in the amount found by the verdict, for he had no interest in the cattle, being merely an agent for the defendant Morris, to take and sell the cattle for Morris. On this point see *Coe v. Peacock*, 14 Ohio, 187; *Booth et al. v. Ableman et al.*, 20 Wis. 23.

III. The said plaintiff in error also moved to set aside the verdict in said case because the assessment of damages was manifestly erroneous. Said motion was overruled, and plaintiff excepted. That this was error is manifest when it is considered that C. E. Poteet, a mere employee of W. A. Morris, and having no interest in the property in question, has a verdict for damages with W. A. Morris for seven thousand four hundred and fifty-four dollars and ninety cents: See *Coe v. Peacock*, 14 Ohio S. 187; Code of Civ. Proc. 1869, sec. 195; Pow. on App. Proc. 145, 146; *Hewsen v. Saffin & Smith*, 7 Ohio, 232; 2 Nash's Pl. and Pr. 828, 829.

IV. A fourth error on the part of said district court, and for which the said plaintiff in error moved said court to set aside said verdict of the jury, was that said verdict was not in proper form, as it did not find that the defendants, or either of them, were entitled to the right of possession or property in the cattle in question. But the court overruled said motion to set aside said verdict and render judgment thereon. That this was error: See Code of Civ. Proc. 1869, sec. 195; Powell on App. Proc. 145, 146; *Hewsen v. Saffin & Smith*, 7 Ohio, part 2, 232; 2 Nash Pl. and Pr. 828, 829.

V. A fifth error of said district court complained of by

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said plaintiff in error is, that said district court erred in permitting a certain contract to be read to the jury, the said alleged contract being in writing. This was clearly error, for two reasons: First, because the execution of said written contract had not been proved; Second, because the contract was irrelevant. On the first ground of objection, see 1 Greenl. on Ev. sec. 569 *et seq.*; 2 Phill. on Ev. 386-7-8-9, 394, and cases there cited; 11 Wend. 136; 9 Johns. 136; 15 Pick. 534; 5 Cowen, 383; 13 Wend. 118, 188; 5 Car. & Payne, 48; 2 Serg. & Rawle, 420. On the second point of this alleged error: See 3 Pars. on Con. 234-243, ch. ix, title "Lien;" 1 Pars. on Con. 569-572, title, "Mortgage."

VI and VII. These alleged errors involve the same questions involved in error V.

VIII. Another alleged error of the said district court, as shown by the record, is involved in the first instruction of the court to the jury. This instruction is inconsistent with instruction No. 3, as given by the court, and assumes that all the writings given in evidence by defendants were duly proved, so far as their execution was concerned; and also assumes that the defendant Poteet took possession of the cattle by virtue of certain writings given in evidence, and also assumes that the defendants retained a lien on the cattle without possession and without taking a mortgage on the cattle, as required by the laws of this territory: 3 Pars. on Con. 234, 243, title "Lien;" 1 Pars. on Con. 569-572.

IX. As to the alleged error involved in the second instruction of the district court given to the jury, see authorities cited as to error 8; and,

X. As to the alleged error involved in the third instruction given to the jury by the said district court, see authorities above cited.

XI. As to the error involved in the fourth instruction given to the jury by said district court, it may suffice to say that the court by its instruction treats the said contract between said Gregory and Morris as a chattel mortgage with all its incidents, and among other incidents which the

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court gives is that of a right of redemption in the mortgagor after condition broken. On this question see the authorities above cited in 1 and 3 of Par. on Con.

XII. The alleged error involved in the fifth instruction, given by said district court to the jury, is fully considered in the preceding alleged erroneous instructions.

XIII. The sixth instruction given by the court to the jury was erroneous for two reasons: 1. Because there was no evidence before the jury to enable them to compute the difference between gold and currency; and, 2. Because the verdict and judgment in the case, if the plaintiff's obligation was to pay for the cattle in gold, should be for the proper amount in gold and not in currency. On this point see *Butler v. Horwits*, 7 Wall. 258; 7 Id. 229; *Tribilcock v. Wilson*, 12 Wall. 687; *Jones v. Childs and Vansicke*, 8 Nev. 121.

XIV. The next alleged error in this case relates to the seventh instruction of the court below to the jury.

J. W. Kingman, for defendant in error.

I. To the first error relied on by the plaintiff, we say that the issue tendered by the defendants was simply *non detinet*, that they did not unlawfully detain the property replevied. But this plea puts in issue the title to or ownership of the property: 10 Ohio 344; 12 Id. 112. No amendment was therefore required in order to let in evidence of ownership in the defendants, and the plaintiff was wrong in objecting to such evidence and compelling defendant to amend. He can take no advantage of error in his favor: Seney's Code, 276, sec. 17.

II. Second, third and fourth. It is sufficient answer to each of the second, third and fourth objections that a general verdict for defendant finds the issue presented for them and finds the right of property and right of possession in them. It was then the duty of the jury to assess such damages for the defendants as they might think right and proper: Seney's Code, 275, 377.

III. The execution of the contract was proved by Greg-

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ory himself on cross-examination. But no objection of this kind was taken at the trial, and cannot be taken now: Hill. on New Trials, 77.

IV. The written contract was the only contract made by the parties. It was the duty of the court to instruct the jury as to its legal effect, and this construction can only be assailed by showing it to be erroneous or that it misled the jury: Hill on New Trials, 250; 1 Par. on Con. 569.

V. The currency of the country is a matter of public notoriety, and both the court and the jury will and must take judicial notice of it without proof: 1 Greenl. sec. 4-6; 1 Phill. 618-626. The cases cited from Wallace are all divided opinions and turn on another point, to wit: whether legal tenders can pay a contract payable in gold by its terms. If there is an error, it is only one of computation, and this court will correct it. The verdict will not be set aside. But this point, as now presented, was not raised at the trial: Hill. on New Trials, 78.

As to the objection of sending written evidence to the jury room: Seney's Code, 368; Hill. on New Trials, 174.

By the Court, FISHER, C. J.: This was an action in replevin, brought to this court from the February term, A. D. 1874, of the district court in and for the county of Albany, in the second judicial district of the territory of Wyoming.

The record of the case shows that on the twenty-sixth day of February, A. D. 1873, W. A. Morris, one of the defendants in error, and A. J. Gregory, plaintiff in error, entered into a written contract, in the city of Austin, in the state of Texas, stipulating for the sale of a large number of cattle to A. J. Gregory, in accordance with a schedule of prices attached to and made a part of the record in this action. One of the terms of said contract was that the said Morris, having sold and delivered to said Gregory the cattle referred to in the written contract, was to retain a lien on the cattle until the whole of the purchase-money, amounting to between seven and eight thousand dollars, should be

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paid by Gregory, and that in the event of the balance of said purchase-money not being paid on or before the first day of October, A. D. 1873, that then the agent of Morris, viz: C. E. Poteet, was to sell all or such portion of said cattle, as would pay the purchase-money then remaining due and unpaid, as well as the wages and other expenses of said Poteet, as has been stipulated for in the said written contract.

The written contract having been duly signed by the parties, Morris gave Poteet a power of attorney authorizing him to accompany and retain the lien provided for in said contract.

The parties arrived on the Laramie plains with said cattle some time in the month of September, A. D. 1873, and the cattle, remained in the possession of Gregory from that time until October 4, 1873, at which time the purchase-money not having been paid, Poteet took forcible possession of the cattle and drove them from the ranch at which they were grazing to the ranch of Mr. Alsop, some distance from there.

Gregory then brought his action in replevin to recover possession of the cattle and damages for the wrongful detention thereof against both Morris and Poteet, setting up the ordinary counts in his petition.

The defendants filed an answer, denying all the allegations of plaintiff's petition, and denying specially that they wrongfully detained the said property.

The case coming on for trial in the district court, the plaintiff proved the possession, ownership, taking, demand and detention of the property, with the value, etc.

The defendants then undertook to introduce the written contract and other documentary evidence, which was objected to by plaintiff's attorneys, and the objection was sustained by the court. Defendants then asked permission to amend their answer, setting up the special matter which had been refused under the original answer. This was also objected to by attorneys for plaintiff, but the objection was

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overruled, the written evidence was admitted, to which the plaintiffs' attorneys reserved their "exception."

All the evidence on the part of the defendants was then given, together with certain rebutting evidence on the part of the plaintiff, and the case went to the jury under certain instructions of the court, to some of which exceptions were saved, which will be adverted to hereafter, and the jury returned a verdict for defendants, assessing the damages at seven thousand four hundred and fifty-four dollars and ninety cents, and judgment was duly entered on the verdict.

The plaintiff's attorneys filed a motion for a new trial, and assigned the same errors which are brought to this court by petition in error. The errors relied upon by the plaintiff in error, who was plaintiff below, are :

1. That the court below permitted the defendants to file an amended answer to plaintiff's petition, in which they set out the documentary evidence upon which they relied to defeat the plaintiff's claim.

2. That certain questions were permitted to be propounded to the plaintiff on his cross-examination touching the terms of the contract for the sale and purchase of the cattle taken in replevin.

3. The instructions of the court below, as well as the instructions refused to be given on behalf of the plaintiff. There are a large number of exceptions taken, but we find that the foregoing embrace the substance of the whole.

If there was any error on the part of the judge who presided at the trial of the case, on the subject of permitting or refusing the written contract, or other documentary evidence, we do not find that the plaintiff had the right to complain of it, from the fact that we are of opinion that the defendants should have been permitted to have given the said evidence under the issues raised by the petition and answer. The petition of the plaintiff set out the wrongful detention of the cattle, which constitutes the gist of the action in replevin, while the defendants set up the plea of *non*

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detinet. The plaintiff's attorneys claim that the plea of *non detinet* at common law admits the title to be in the plaintiff. This, however, is clearly wrong; the plea of *non cepit*, which was the general issue at common law in actions in replevin, originally did admit the title to the property to be in the plaintiff, but this was only so long as actions in replevin were resorted to to recover goods and chattels distrained for rent: See 3 Blackstone, 13. But under our statute the plea of *non cepit* is hardly ever set up, but the wrongful detention usually being the turning point in the case, the plea of *non detinet* has virtually become the general issue.

If then, the defendants plead the general issue, we think they should have been permitted to have proven property in the cattle taken in replevin. It is true the plea of "property" is set up in many of the courts in this country, but we think that under the practice in this territory that the defendants had the right to prove property in themselves under their general denial, or at least under the special denial of the wrongful detention of the property. Now, conceding this to have been error, was it such an error as the plaintiff could complain of? Surely not; the court having refused to permit defendants to give in evidence the testimony by which they could establish their right to the possession of the property taken in replevin.

We think the court below did right in permitting the defendants to amend their answer, so that the facts might go to the jury. Amendments of this character are clearly permissible under the code of civil procedure of Wyoming; this is especially so when we take into consideration the ruling of the court on the objection of the evidence under the original answer filed. Another reason why we do not find any error in permitting the amendment to the answer to be filed, is found in section 149 of the code of 1869: That "the court in every stage of action must disregard any error or defect in the pleading or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such

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error or defect.” Now, while we do not find any error, unless it be the refusal of the court to allow the documentary evidence to be given under the original answer, yet even if there was any other error, surely the ruling of the court did not wrongfully affect the rights of the plaintiff.

The next point to be considered is, whether the defendants had such a right of possession of the cattle in question as justified them in taking them into possession and refusing to surrender them to the plaintiff on demand being made? A reference to the written contract, we think, is enough to satisfy any one on this question. Written contracts are supposed to contain the intentions of the contracting parties at the time they are made, and while ordinarily the delivery of chattels into the custody of the vendee is a transfer of the right of property from the vendor to the vendee, and as between them and third parties the law presumes that a change of possession carries with it a change of title; but as between the vendor and vendee, there may very readily be such stipulations as causes the right of property to remain in the vendor, as gives him the right to resume possession upon the breach of any of the covenants contained in the stipulations of sale: See 3 Par. on Con. 252, 258. The record in this case discloses just such a contract, containing such a stipulation—that if the vendee failed to comply with the terms of the written contract, that then the property was to revert to the vendor under other covenants in said contract.

The next point to be considered is, the instructions of the court, viz., that the rights of the parties are to be determined by the terms of the written contract; but having treated of this under the second point considered, we need not enlarge here, as we deem it sufficient to say that we find no error in the instructions given.

There is another error complained of, and that is, that the verdict of the jury should have been based upon a gold standard, inasmuch as the sum due on the contract was payable in gold, but this suit not having been brought on the

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contract, but for damages for the wrongful taking and detention of the property, the jury did right in returning their verdict without reference to the standard of either gold or currency.

There is one other question raised by the plaintiff in error which perhaps demands the attention of this court, and which has not been referred to, and that is, the extent to which the jury, as it is claimed, should have gone in making up their verdict. The code of this territory provides that where the property taken in replevin has been taken by the plaintiff, and the jury find for the defendant, they shall find whether the defendant at the commencement of the action had the right of property or the right of possession only, and in either case shall assess such damages as they shall think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for defendants: Civ. Code of Wyoming, 1869, sec. 195. We do not think the finding of either of the matters specified in the section constitutes a returning of a verdict, but rather the consideration of the grounds upon which the verdict is based. In other words, the jury is instructed to find whether a certain state of facts exist, and if so, they shall return their verdict accordingly; and not that the jury are to return the grounds upon which the verdict is based. It is true Mr. Seney, in his code, holds that a general verdict is not sufficient, and cites a case decided by one of the courts of Ohio on the point; but with all due deference to that authority, we are of the opinion that in this case no good would be accomplished by such a special finding, nor has any injury been sustained by either party in consequence of the general verdict, and as our code provides that the proceedings shall not be disturbed on account of any informality which does not affect injuriously either party, we do not find this a ground to disturb the verdict.

We think substantial justice has been done, and that the verdict of the jury is amply sufficient to sustain all the rights of the parties. The judgment of the court below is affirmed.

Statement of Facts.

BONNIFIELD *v.* PRICE.

STATUTE OF LIMITATIONS.—While the statute of limitations of Wyoming territory provides that a cause of action, barred by the statute of the state or territory in which it arose, is also barred in Wyoming, yet if it conclusively appears to the court that the defendant has been for such a length of time absent from such state, where the cause of action originated, as to prevent the statute of limitations running there, such absence will also prevent the statute running here, and the court should so hold.

DEMURRER.—Where a demurrer in one action was sustained to the plaintiff's petition, for the reason that it appeared from the face of the petition that the cause of action was barred by the statute of limitations, and a second action was commenced for the same cause of action, but with the petition so drawn as not to raise upon its face the question of the statute of limitations: *Held*, that the judgment upon the demurrer in the first suit was no bar to the second proceeding.

ERROR to the First District Court for Laramie County.

This action was commenced in the district court for Laramie county, in November, 1874, by the plaintiff in error against the defendant in error, on a judgment recovered against the defendant and one Joseph Tyson, in the state of California, in the year 1861. The petition alleges that there was remaining unpaid of said judgment, on the fourteenth day of December, 1861, a balance of one thousand seven hundred and sixty-five dollars and seventy-one cents, and that said amount, with interest at two and a half per cent. per month, still remains due. Judgment is prayed for said amount, with interest. The petition also avers that the action is not barred by the statutes of limitation of California or Wyoming, because the defendant has not been within the state of California or the territory of Wyoming for five years since the rendition of said judgment. The amended answer contained a general denial of petition, and plead in bar to the action a judgment rendered in said district court in favor of defendant and against the plaintiff on the thirteenth day of June, 1874, and the statutes of limitation of California and Wyoming.

The evidence on the trial of the issues raised by the plead-

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ings showed that the judgment was recovered against the defendant Price and one Joseph Tyson in the state of California, and that the balance remained due and unpaid, as averred in plaintiff's petition; that the defendant Price had not been in the state of California or the territory of Wyoming for five years since the rendition of the judgment, but that for most of the time since the rendition of said judgment he had been absent from the state in the military service of the United States.

The evidence also showed that an action was commenced on the same judgment in the said district court at a previous term, as averred in the defendant's answer; that a demurrer was filed to the petition in the previous action, and that judgment was given on said demurrer for defendant Price, which judgment or demurrer still remained in full force. The statutes of limitation of California were offered in evidence, to which reference is made in the decision of the court. The judge before whom the case at bar was tried instructed the jury that they should find for the defendant Price. This instruction was based solely on the statutes of limitation of California and Wyoming.

The jury that tried the case in accordance with the instructions of the court found for the defendant. After a motion for a new trial was overruled by the court, judgment was rendered on the verdict for the defendant.

The other facts in the case sufficiently appear in the decision of the court.

E. P. Johnson, for plaintiff in error:

I. The statute of California provides that during the time the debtor is out of the state the statute of limitations does not run, and that time shall not be computed, etc. It is conceded that Price was out of the state most of the time since the rendition of the judgment, but section 19, article XI, of the Constitution of California is relied on to avoid that exception of the statute; Price being absent in the military service of the United States. But that constitutional

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provision is to the effect that such absence shall not affect the question of residence; whereas in that state, as in most others, the running of the statute of limitations does not depend in any sense upon that question, and is therefore unaffected by the constitution. That such was the received construction of the English statutes of James and Anne, and that they applied to subjects of the realm and foreigners alike, as well to those who were out of the realm when the cause of action accrued, as to those who were within the realm and departed therefrom without any reference to change of residence, but simply to the question of presence or absence of the party, is settled by authority that is overwhelming and admits of no question: Angel on Lim. secs. 194, 204, 206; 3 John, 263. So in the states where equivalent or analogous expressions are used, as "out of the state," instead of "beyond the seas;" the statutes are supposed by the authorities to mean just what they say, and they so hold. The question of residence or citizenship does not enter into the discussion except incidentally. The supreme court of the United States, and most of the state courts, hold the words "beyond the seas," when used in the state statutes, to mean and be equivalent to "out of the jurisdiction of the state": Angel on Lim. sec. 200; Nash Pl. & Pr. 15; 3 Cranch, 174; 3 John, 263-7; 1 Ill. Dig. 363, sec. 59; 16 Ohio, 145; 2 Iowa, 498; 16 Cal. 93. And in several states successive absences from the state are counted out of the time limited, on the principle that under the statute the parties should be in such position that the creditor has for the full time limited an opportunity to enforce his claim by suit. In a number of the states, as in Vermont and New York, a party to have the benefit of the disability of defendant, must show not only that he is out, but that he resides out of the state, thus by statute making it a question of residence. And in some of those states the courts hold that while parties have a legal residence in the state, absence constitutes a residing out of the jurisdiction within the meaning of the statute of limitations.

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II. The evidence shows that the judgment sued on was dormant in California, and could not be enforced by execution or other process. Hence it was claimed (and the court so held) that it furnished no cause of action upon which there could be a recovery. Is the judgment dormant? It is, however, confidently claimed that the position is erroneous. At common law a judgment becomes dormant and could not be enforced by execution after a year and a day. The effect of the California statute is to extend the time. The error consists in supposing that a judgment is snuffed out of existence for all purposes, simply because it is dormant, whereas questions once adjudicated cannot again be tried. A judgment is always a cause of action from the moment of its rendition, and may be enforced by suit until bound by the statute of limitations: Broom's Leg. Max. 327; Bigelow on Estoppel, 7; 3 Black. 421; Freeman on Judgments, sec. 432; 16 Cal. 373.

III. The judgment rendered in the first case commenced on this judgment was no bar to this suit, as none of the matters in controversy here were adjudicated in that suit. It was simply a judgment that the former petition on its face did not state a cause of action. The only question decided was that the petition was bad, and that the supreme court affirmed that judgment. A judgment on demurrer, where the merits of the action are not involved, is no bar to a subsequent adjudication of the merits of the case: Freem. on Judg. 212, 231; 2 Smith's Lead. Cases, 808; *Clark v. Young*, 1 Cranch, 181.

D. McLaughlin, for defendant in error.

There is really but one error alleged and set forth, and that is the first one enumerated. There could be no recovery in this action for the following reasons:

I. There was a former adjudication of the same subject-matter between the same parties and hence the former decision was a bar. 1. The judgment of a court of competent jurisdiction is not only final as to the matter in controversy

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and actually determined, but as to every other which the parties neglect to litigate in the cause and which they might have decided: ——— v. *Howe*, 2 Barb. 586; *Southgate v. MacGurney*, 1 Page, 41, 3 Comst. 522, 3 Denio, 243; *Hays v. Reen*, 34 Barb. 156; *Harris v. Harm*, 36 Id. 94; *Foster v. ———*, 50 Id. 393.

2. A judgment extinguishes the demand, and if the plaintiff brings two actions for the same cause, a judgment in one is a good bar to the other: *Nichols v. Mason*, 21 Wend. 339; *White v. ———*, Seld. 137; *Castle v. Myers*, 4 Kent, 329; see 2 Abb. N. Y. Dig. 185, n. 10, 11, 12; Freem. on Judg. secs. 215, 216.

3. A former judgment on demurrer is a bar: ——— v. *Davis*, 3 Denio, 238; *Cleamates v. Meredith*, 1 Wall. 25; *Aurora City v. West*, 7 Id. 82; *Goodrich v. City*, 5 Id. 573; Freem. on Judg. sec. 267.

4. There is a well marked difference between an order of the court and a judgment: See Code of Wyoming, 73, sec. 509. Every decision of a judge or court made as entered in writing, and not included in a judgment, is an order. Sec. 377 reads: A judgment is the final determination of the rights of the parties in action.

An action sustaining a demurrer is not necessarily a judgment that finally determines the rights of parties. The party whose pleading is demurred to may be permitted to amend in some defective particular on such terms as the court may deem just, or if not susceptible of amendment, the action may be dismissed by the plaintiff whose petition may have been demurred to, and the demurrer sustained, and a new action begun, because there really has been no decision of the cause of action in a judgment; when, on the whole state of facts presented in a petition, no cause of action is stated, there can be no cause of action by an amendment.

If the plaintiff in such a case, in invoking a final judgment of the court by alleging error and taking exceptions and pressing the case to judgment, instead of dismissing his action and commencing anew, he ought to be made to under-

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stand that a final judgment of the court on a demurrer is of some utility, and not merely an idle declaration that has no perceptible effect in any way, except to compel the opposite party to attend court at great cost and inconvenience. If the judgment first rendered in this case is not a bar, of what earthly value is it to any one, and what potency has the supreme court in offering it in all things? If the court had decided adversely to the defendant on the demurrer, he would be bound by the decision. The plaintiff should be equally bound by its judgments.

II. The cause of action was barred by the laws of California, and therefore by the laws of this territory, long prior to the commencement of this action, for these reasons:

1. The constitution of the state of California (Art. II., sec. 4, par. 109, Hittell's Laws) provides that the political rights of no person shall be affected by reason of their being in the army or navy of the United States.

2. In addition to this guarantee, the same constitution provides (Art. XI., sec. 19, par. 220, Hittell's Laws): "Absence from this state on the business of the state, or of the United States, shall not affect the question of residence of any person."

The first of these guarantees relates to political rights of persons, and the second to all other rights depending on the residence of the party in that state who may depart the state on the business of the state or of the United States. The question of his residence shall not be affected in any manner, directly nor indirectly.

This is but a formal recognition in the fundamental law of that state, of the well known principle, that a soldier or sailor retains the residence he had when he entered the army or naval service, and is not competent to gain a residence elsewhere while he continues in service.

They are not free agents, and their movements from place to place are not voluntary. Obedience to the orders of superiors are exacted by the rules and by discipline, and all persons in the army and navy retain the political and

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civil rights they possessed when they went into either branch of the service. It would be contrary to public policy to hold otherwise. By plaintiff's own showing the defendant Price was a resident of California from 1850 until 1862. He entered the service of the army in September, 1861, and left the state by order of Brigadier-general Wright in April, 1862, on the business of the United States, and his absence in the military service has been continuous, except passing through the state en route to Arizona, under military orders, in 1872. His residence remains intact, and he is now, and has continued to be, since April, 1862, a resident of that state. This case, tried, as the records show, upon this petition, and the verdict rendered upon the pleadings and the proofs, on the thirteenth day of November, 1874.

The plaintiff on the following day filed an amended petition, in which the subject of Price's residence is entirely left out, and one allegation substituted, that defendant was not within the state of California or the territory of Wyoming for the period of five years since the entry of the judgment sued upon. No issue could be taken on this allegation by defendant, as the action had been determined the day before in defendant Price's favor. Even had the allegation in the petition on which the case was tried been made in time, it would not help the plaintiff's case, for these reasons:

1. A money judgment in California at the date of the rendition of the judgment, nor at any time since, was what, in legal parlance, is known as "a cause of action:" Cooley's Com. 47, 48; 1 Kent, 475.

2. A cause of action is the right a party has to institute proceedings in a court and carry them through to judgment.

3. "A judgment is the final determination of the rights of the parties in an action or proceedings:" Hittell's Laws, par. 5084, sec. 144, Pr. Act.

4. When the judgment requires the payment of money
* * * the same shall be enforced * * * by execution:

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Hittell's Laws, part. 5153, sec. 213, Pr. Act. No other process is known in that state.

5. "The party in whose favor judgment is given may at any time within five years after entry thereof issue a writ of execution for its enforcement:" Hittell's Laws, par. 5149, sec. 209, Pr. Act. "Every process which may be required to completely enforce a judgment must be taken out within five years after its entry:" *Bowen v. Crary*, 30 Cal. 621; *Mann v. McAtee*, 37 Cal. 15.

6. The execution on a money judgment in that state could only run against the property of the judgment debtor, and might be enforced against the personal property, and that proving inadequate to satisfy it, his real estate could be levied upon: Hittell's Laws, par. 5150, sec. 210, Pr. Act. The fact that defendant Price was either within or without the state for five years after the rendition of the judgment could in no way affect the judgment. The process of execution could have been issued, at any time prior to the nineteenth day of September, 1866, against his property for the enforcement of the judgment; but if it was not then in the language of the supreme court of that state in the case of *Mann v. McAtee*, 37 Cal. 15, the judgment became defendant's, and the remedy on it barred by the lapse of time.

If the defendant did not have property in the state subject to execution at any time within the five years, that is a misfortune that the law does not provide against. It will give a party his judgment and the process to enforce it, but does not undertake to furnish property for defendant to satisfy the execution against them. It is proper here to state that previous to April 8th, 1861, the practice act of the state of California contained a section (214) that permitted an execution to issue after the lapse of five years on leave of the court when the party made an affidavit that some part of the judgment remained unsatisfied, and was done on that date. This section was repealed on the second of April, 1866. The section was re-enacted in this modified form: "In all cases other than for the recovery of money the judg-

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ment may be enforced or carried into execution after the lapse of five years; by leave of the court:" Parker's Laws, par. 9129, sec. 214, Pr. Act. Judgments for money are expressly reserved from the operation of this section. In concluding the second point raised, that the cause of action sued on in the district court here was barred by the laws of California, and therefore by the laws of Wyoming. I refer to section 19 of the code of this territory; to Hittell's Laws, par. 4359, section 17, Pr. Act, 1; and to the following adjudicated cases in the supreme court of the state of California: *Mason v. Cronin*, 20 Cal. 221; *Bowen v. Crary*, 30 Cal. 621; *Mause v. McAtee*, 37 Cal. 11.

III. That the judgment sued upon in this case has been defunct since the nineteenth day of September, 1866, and could not be enforced in that state after that time, nor be the basis of an action in the courts of any other state or territory. By the act of congress of the twenty-sixth of May, 1790, the judicial proceedings of the courts of any state shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the states from whence the records of such judicial proceedings are taken: Brightley's Digest, vol. 1, p. 265. If, therefore, the judgment sued upon in this case was defunct in California at the commencement of this action, no action could be. The judgment can have the same faith and credit here that it would be entitled to in the courts of California and no more. The courts of that state say that every process necessary to enforce its judgments must be taken within five years after the date of its entry: *Bowen v. Crary*, 30 Cal. 62.

That money judgments shall be enforced by execution, and this is the only process known to their laws to enforce them: Hittell's Laws, Pr. Act, secs. 209, 210, and 213. That after the lapse of five years from the date of entry of a money judgment, it becomes defunct and all remedy is barred: Parker's Laws, 9129, sec. 214; *Mann v. McAtee*, 37 Cal. 15. The statutes of limitation are statutes of repose:

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Spinney v. Gray, Mason's C. C. Rep. 523; opinion of supreme court of the United States, case *Leffingwell v. Warren*, 2 Black's Sup. Court Rep. p. 599.

The defense of the statute of limitations, is a legal defense, and stands on an equal footing with other statutory defenses and is not to be discriminated against by the courts: *Shelden v. Jackson*, 41 Barb. 55.

By the Court, CAREY, J. It is clear from the laws of California offered in testimony and the other evidence in the case, that the judgment upon which this suit was commenced in the district court was dormant and could not, from the lapse of time, be enforced in the state of California by execution. Indeed this point has not been contested. The questions then arise, can an action be maintained upon a judgment; and if so, was the action commenced in the district court in this case barred by the statutes of limitations of California or Wyoming? A judgment is a contract of record, and falls under the head of contracts by specialty: Chitty on Contracts, 2; 1 Parsons on Contracts, 7. It appears to be settled by numerous decisions that a judgment is such contract as may be made the basis of an action in the jurisdiction where recovered. Though adverse decisions may be found, yet Freeman on Judgments says that the true rule is that an action may be brought on a judgment and that no other reason need be stated for bringing such suit than that the judgment remains unpaid. The right to bring the action is not barred nor suspended by the issuing of an execution, nor because the right to take out an execution exists.

This was the rule at common law, and has been adopted by most of the states: Freeman on Judgments, 432 *et seq.*; 4 Conn. 402; 28 Id. 112; 20 Johns. 342; 9 Id. 26; 16 Id. 372. It has been expressly decided in the California case referred to that an action may be maintained in that state on a judgment, and that, too, after the right of execution is gone by lapse of time. It is contended that this

decision was based upon a statute of California now repealed, but on a careful examination of the decision we find the decision is not based on a statute, but on the rule as it existed at the common law, and the dictum of the case of *Mason v. Cronin*, 20 Cal. 211, supports the same rule.

The next question presented is: Was this action barred by the statutes of limitations of California or Wyoming? Section 4359 of the laws of California, 1850–1854, provides that: “An action upon a judgment or decree of any court of the United States, or of any state or territory of the United States,” can only be commenced within five years; but section 4364 of the same laws provides that if, after a cause of action shall have accrued against a person, he depart the State, the time of his absence shall not be part of the time limited for the commencement of the action. Section 19 of the code of civil procedure, laws of Wyoming, 1873, makes the provisions of the laws of California cited applicable in this case.

The supreme court of California in the case of *Mahan v. Cronin*, 20 Cal. 211, held that the portion of said section 4359 cited was applicable to judgments recovered in the state of California. It cannot be contended under the evidence in the trial of the case in the court below, that the defendant Price was in the state of California between the time of the rendition of the judgment and the commencement of this action in the district court for the period of five years, or for periods of time that would aggregate five years.

It is true that it is shown that his absence was caused by his being employed in the military service of the United States, and the court is referred to section 4, art. 2, and section 19, art. 11, of the constitution of the state of California. The first of the references provides that for the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his employment in the service of the United States, and the second reference provides that absence from the state, on business of the state or of the

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United States, shall not affect the question of residence of any person.

We cannot see how these constitutional provisions affect the question. It is not a question of political rights, nor of residence, but a question of presence in or absence from the state, and the provisions of the constitution cited have no reference whatever to the statutes of limitation under consideration. To obtain the advantage of the statutes of limitation of California, one need not be a resident of the state, but it is necessary for him to be in the state, and subject to the process of the courts, for the time limited in the statutes. Nor does the being a resident and citizen of the state give such resident and citizen any advantage under the statute of limitation not possessed by the non-resident. If a resident or non-resident, after the right of action has accrued against him, leave the state, the statute of limitation ceases to run until his return to the State.

Reference is made to the case of *Brown v. Crownly*, 30 Cal. 621, and *Mause v. McAtee*, but both of these cases have reference to the time in which execution may issue to enforce a judgment in the state of California, concerning which no question is raised in this case.

The remaining question presented for the determination of this court is, was the action barred by the previous action and judgment (case *Bonnifield v. Price*, decided at the last term of this court)? We are of the opinion that the action and judgment in the previous case were properly held by the district court not to be a bar to this action. It is true the previous suit was commenced on the same judgment as the case under consideration, but it appeared upon the face of the petition in the previous action that the action was barred by the statute of limitations. This defect in the petition was taken advantage of by a demurrer, and judgment was rendered on the demurrer. In the case at bar the petition contained an averment showing that the action was not barred by the statute of limitations.

No one of the questions presented in the previous case

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was again adjudicated in the case at bar, nor was the case in the previous action determined upon its merits. A judgment on a demurrer to a petition is only conclusive of those questions necessarily determined by such demurrer. The effect of the judgment and the demurrer was merely to determine that the petition in the former action did not state sufficient facts to constitute a cause of action. In the action at bar the petition does state facts sufficient to constitute a cause of action, and the plaintiff was not estopped from prosecuting the action by the previous action and judgment.

Judgment of the district court reversed and cause remanded for new trial.

BOSWELL v. THE BOARD OF COUNTY COMMISSIONERS OF ALBANY COUNTY.

APPEAL FROM COUNTY COMMISSIONERS.—The statutes of Wyoming providing for appeals from decisions of the boards of county commissioners to the district court, refer only to cases first presented to such boards for adjustment and payment.

IDEM.—A person having a claim against a county, is not, by reason of those statutes, prevented from bringing an original action to recover the same in the district court.

IDEM.—He is entitled to a choice of remedies.

ERROR to the Second District Court for Albany County.

The plaintiff in error on the fourth day of August, 1873, filed in the district court of the then first, now second, judicial district, sitting within and for the county of Albany, Wyoming territory, his petition, and on the fifth day of September his amended petition against the board of county commissioners, alleging that plaintiff was the sheriff of Albany county and keeper of the common jail thereof; that said defendant was indebted to plaintiff for the board of prisoners, in the sum of one thousand six hundred and eighty dollars and forty-four cents: that an itemized statement of

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account, duly authenticated as by law required, was presented to the then board of county commissioners, and the said board refused to allow the same.

To such amended petition the defendant interposed a demurrer, and for grounds of the same alleged: That the court had no jurisdiction over the subject-matter of the action because the plaintiff did not appeal from the decision of the board of commissioners; and, as another ground: That the court has no jurisdiction over the persons of the defendant, because suit was brought here on petition and summons instead of by appeal from county commissioners. On these two grounds the court sustained the demurrer. To this ruling of the court the plaintiff then and there excepted.

M. C. Brown, for plaintiff in error:

I. It appears that the court sustained the said demurrer on the ground that the plaintiff could only sustain his action by appeal from the decision of the board of county commissioners: Laws Wyoming 1869, 150, 151. The court erred in sustaining the said demurrer, because the said statute before referred to is unconstitutional and void: Organic Act, sec. 9. Appeals only lie from one court to another, from courts of an inferior jurisdiction to higher courts: 1 Bouv. 127; 14 Mass. 414. A court is a body having judicial power; "a place where justice is judicially administered:" Coke Litt. 58, note 8. The board of county commissioners is not a court, and is not vested with judicial power: Laws of Wyoming, 146. That such a body cannot be vested with judicial power: Organic Act, sec. 9. The construction of statutes as to corporate powers—that they must be strictly construed: See 2 Kent, 298; 19 Iowa, 212; 6 Indiana, 403. The statutes creating the board of county commissioners provides that said board may sue and be sued: Laws of Wyoming, 146, 147. There is no provision of our statute for maintaining an action against a court, nor does any such power exist at common law. In this case it is an under

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taking by a party to the suit to sit in judgment in its own behalf. The demurrer can only be sustained on the ground that the act of the board of county commissioners in passing upon the bill was a judicial determination of the matter, and then judgment final, unless appealed from, and a bar to this action: 1 Bouv. 372. What are judgments? 1 Bouv. 760 *et seq.*

II. If the act of the legislature of 1869 confers on the commissioners judicial power, and creates thereby a court, it is a court of inferior jurisdiction to the district court; there is no limit to its jurisdiction as to the amount involved. There are three judges to sit in judgment. If it is not an inferior court, appeal will not lie: 14 Mass. 414. The statutes of 1869 provide that an appeal may be taken from commissioners to the district court, but it is not the only way.

C. W. Bramel, for defendants in error.

The defendants in error rely upon the following general principles which it believes applicable to cases of this character, the construction of statutes and powers of civil or *quasi* corporations:

I. A county is not a corporation, but a mere political organization of certain of the territory within the state, particularly defined by geographical limits for the more convenient administration of the laws and police powers of the state, and for the convenience of the inhabitants. Such organization is invested with certain powers, delegated to it by the state, for the purpose of civil administration, and for the same purpose it is clothed with many characteristics of a body corporate.

II. A county may not improperly be called a *quasi* corporation, for it is in many respects like a corporation.

III. But a county can neither sue nor be sued, except by express power conferred by statute, and in the manner so expressed.

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VI. Nor can any of the officers of a county, by virtue of such office, sue or be sued, except as provided by statute.

It follows, therefore, that the only powers to sue, possessed by the board of county commissioners, is conferred upon them by statute. When a claim against a county is created by statute and is to be paid by the county, upon the allowance of the county commissioners, if the claim is disallowed in part by the county commissioners, the remedy of the claimant, if not satisfied with the determination by the commissioners, is to appeal to the district court, and in such a case he cannot sue at common law: 8 Ohio St. 354; 5 Ohio, 490; 13 Ohio St. 388. And such statute is not repugnant to the constitution of the United States and the organic act of the territory: Dillon on Mun. Corp. 55, note 2; 1 Ohio St. 437. 1. Because such appeal saves to the party aggrieved his constitutional right to a jury trial: Dillon on Mun. Corp. 361; Cooley Const. Limitations, 410. 2. In this connection, defendants in error also cite: 18 Wallace U. S. 648.

By Court, THOMAS, J. This cause is brought by writ of error from the district court of the second judicial district for the county of Albany to reverse a decision sustaining the defendant's demurrer to the plaintiff's petition herein.

The petition in the district court alleges that the plaintiff was on and before January 1, A. D. 1870, and for some time thereafter, sheriff of Albany county, Wyoming territory, and the keeper of the common jail of the same; that as such keeper the county became indebted to him in the sum of one thousand six hundred and eighty dollars and forty-four cents for the care and maintenance of prisoners confined in said county jail, and that an itemized account duly verified was presented to the then board of county commissioners, and the said board refused to allow the same. To that petition the defendant interposed a demurrer upon the following grounds:

1. That the court had no jurisdiction over the subject-

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matter of the action, because the plaintiff did not appeal from the decision of the board of county commissioners.

2. That the court had no jurisdiction over the persons of the defendants, because suit was brought in the district court on petition and summons, instead of the appeal from the decision of the board. The demurrer was sustained. The only question in this case arises from the provisions of the laws of the territory of Wyoming (Laws of 1869, 150–151), which are to the effect that when the claim of any person against a county shall be disallowed by the county commissioners, such person may appeal from the decision of said board by causing a written notice of such appeal to be served on the clerk and chairman of the board within ten days after the rendering of such decision, upon the appellant filing the bond, etc., etc.

It is urged upon the part of the plaintiff in error that this law is invalid, for the reason that if its effect is what it is claimed to be by the defendants in error, it would deprive a party of the constitutional right of a jury trial. It is, however, unnecessary to pass upon that question, as it is apparent that the statute referred to only provides a remedy for those whose claims have been disallowed by a board of county commissioners, which may be a more expeditious and less expensive method of procedure than the ordinary mode of procedure, but in no wise prevents a claimant from pursuing the usual course for collecting claims, if he shall deem the same to be best.

The decision of the district court is reversed, and the case remanded for further proceedings.

Argument for Plaintiff in Error.

BATH ET AL. v. LINDENMYER.

ESTOPPEL—PLEA IN BAR.—Defendant in error sued the plaintiff in error for one year's rent of certain real estate. Upon the trial it appeared that the year had not expired, and that only a portion of the rent was due, and the court ordered judgment for that amount only. Suit was subsequently commenced between the same parties for the remainder: *Held*, that the judgment in the first case, although the petition therein prayed for all the rent, was no bar to the prosecution of the second suit.

ERROR to the Second District Court for Albany County.

The facts sufficiently appear in the opinion of the court.

T. J. Street and S. W. Downey, for plaintiff in error:

The errors we rely on are shown by a motion for a new trial, and are substantially: 1. That in this trial the court erred in giving to the jury the instructions to the effect that the claim of the defendant in error had not been adjudicated; 2. That the court erred in refusing to give to the jury the instruction requested by the plaintiffs in error, to the effect that the claim had been adjudicated, and that the defendant in error was hereby estopped from recovering in his action; and, 3. That the court erred in overruling the motion for a new trial.

It will be observed that the action in this case is based upon a written lease—that a previous judgment had been rendered thereon—that the defendant in error moved for a new trial in that action, which was overruled, and the defendant in error did not except, but filed a bill of exceptions to instructions given, and no further action was taken by the defendant in error (except after the motion for new trial made by him was overruled) to move for judgment on the verdict, which was granted. We have, therefore, the strange legal anomaly presented in a twofold form of a party seeking to evade the law of estoppel: 1. Trying to recover a second time in an action involving like issues

Argument for Defendant in Error.

upon the same obligation; and, 2. Seeking to recover judgment in a new action upon the same instrument, after waiving the objections in the first action by reaping the benefits thereof, in taking judgment against his own motion. Comment or citation of authorities would seem superfluous, but see the case of *Doe v. Oliver*, and the *Duchess of Kingston's case*, 2 Smith's Lead. Cas., and authorities there cited on the law of estoppel. Reference is also made to the laws of Wyoming, 1873, ch. 1; and Bigelow on Estoppel, ch. 3, and cases cited.

M. C. Brown, for defendant in error:

It is believed by the defendant in error that the error chiefly relied upon in this case, by plaintiffs in error, is as to the ruling of the court in permitting evidence to be introduced, and in charging the jury in the matter of the two and a half months' rent before referred to. The ruling and instruction of the court was manifestly correct, because if part of a plaintiff's claim is ruled out, for the reason it was premature and not admissible at the time under the pleadings, it afterwards must be treated as if it had never been included or offered in the case: See Freeman on Judgments, 234, sec. 269, and cases there cited; *Baker v. Rand*, 13 Barb. 152; *Harding v. Hale*, 2 Grey, 399. This portion of the claim was not involved in the issues in the former trial, being expressly excluded by the order and instruction of the court; therefore, the presentation of such claim (so excluded in the former trial) at this time in this case, cannot be considered *res adjudicata*: Freeman on Judg. 234, sec. 269.

Had the court in the former trial the right to exclude a portion of the claim sued on as premature and not yet due? That such right existed see Freeman on Judg. 233; *Kane v. Fisher*, 2 Watts, 346; *Bull v. Hopkins*, 7 Johns. 22; 6 Cowen, 261. It may be claimed that while the abstract right exists to exclude from a case a portion of claims not yet due, that

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this particular case is one of those, in which such a division and exclusion could not properly be made, and that the court in the former trial erred in its ruling, when excluding a portion of the claim then sued on; on which said portion so excluded this suit is now brought. Was it error of the court in the former trial in so excluding portion of claim? That it was not error, see *Lease*.

By Court, CAREY, J.: This action was commenced on May 30, 1873, by the defendant in error (plaintiff in the district court) against the plaintiff in error (defendant in the district court) to recover the sum of four hundred and twenty dollars, three months' rent claimed to be due on the first day of May, 1873, on a certain lease attached to and made a part of the petition. The answer of the plaintiff in error was a plea in bar, in which it was alleged that the defendant in error had theretofore sued the plaintiff in error in said district court, in "an action for the same debt as in the declaration alleged, and such proceedings were had thereupon in that action that the defendant in error afterward by the judgment of the court recovered against the plaintiffs in error two hundred and seventy-five dollars for said debt, * * * and the said judgment still remains in force." On the trial of the case at bar, verdict was given the defendant in error for the sum of ———, and judgment rendered on the verdict by the court.

The evidence on this trial, in the district court, showed that the case at bar, and the action and judgment plead in estoppel were founded on the same lease; the lease in each instance being made a part of the petition. That the following provisions among others were contained in the lease, viz: This lease commences to run on to-day, the seventeenth day of June, A. D. 1872, and expires on the first day of May, A. D. 1873, with the proviso, etc. The said Bath & Brother (of the plaintiffs in error) agree to pay as rent for all the property herein described, the sum of one hundred

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and forty dollars per month, payable in advance. It is further understood and agreed, that in case the said City Brewery is destroyed by storm or fire, the said Bath & Brother are not to be held for the rent after that time.

The evidence also showed, that the action in which the judgment plead in estoppel was recovered, was commenced on the thirty-first day of January, 1873, or three months before the time stipulated in the lease for the same to expire, that the said action was brought to recover for the whole time that the lease by its terms was to run, namely, from June 17, 1872, to May 1, 1873, ten and one half months, and that the judge before whom the case was tried, being called upon to construe the lease, instructed the jury: "That it was the intention of the parties thereto that the rent mentioned therein should be due and payable, monthly in advance, and that under the terms of said lease the rent became due on the seventeenth day of each month. That the jury could only find for the rent that had become due at the time of the commencement of the suit."

The judge, in the case at bar, instructed the jury that "there is no evidence submitted in the trial of this cause to show that the claim upon which the plaintiff sues has ever been adjudicated. The jury will, therefore, find for the plaintiff and assess his damage at such amount as the jury find him entitled to under the evidence." * * And the judge, on motion of the plaintiffs in error, refused to give the following instructions, to wit: "That the debt sued upon by the plaintiff had been adjudicated as alleged in the plaintiff's answer and shown by the proof on the trial, and that the plaintiff was for that reason not entitled to recover in this action.

The giving of said instructions and refusal to give the instructions requested by the plaintiff in error, are assigned as error. We cannot see how the previous action and recovery can be considered a bar in this action. The construction put upon the lease by the district court in each instance we consider proper and correct. It is true that

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the rent claimed in the petition of the defendant in error was included in his petition in the previous action, but it is found from the record of the previous action offered in evidence, that the rent sued for in this action was not due at the commencement of the previous action, and that the judge before whom such previous action was tried, expressly instructed the jury that they should not, in making up a verdict take into consideration any rent falling due on the lease after the institution of the suit. In the absence of anything to show to the contrary, and since the plaintiff in error in the previous action took no exception to the verdict of the jury, it would be a violent presumption for this court to conclude that the jury did consider that which the court ruled should not be considered by them. At the time the former suit was instituted only a portion of the rent was due, and the court gave the jury to understand what that portion was. We know of no rule that would make the previous recovery a bar in this. It would be highly unjust to the defendants in error to hold that by their recovery of certain money in the previous action they are now barred from recovering that which since has become due and was rejected in the previous action because it was not due. Similar questions to the one presented in this case have frequently been decided, and the cases of *Kane v. Fisher*, 2 Watts, 246 (Prince, R.); and *Bull v. Hopkins*, 7 Johns. 22 (N. Y.), are directly in point.

Judgment of the district court affirmed.

BONNIFIELD v. PRICE.

APPEAL—PRACTICE.—If an error is committed by the supreme court of the territory, the party believing he has sustained injury thereby has, of course, his right to appeal to the supreme court of the United States; but for an alleged error in judgment of the court a party cannot have a former decision of the court reversed on a mere motion.

IDEM.—A motion to vacate a former decision will not be granted if it is founded upon some question which was raised or could have been raised on the argument of the cause.

MOTION to vacate order reversing judgment of District Court in and for Laramie County.

This cause was argued and submitted at the March term, A. D. 1875, of this court. During the same term an opinion herein was filed and an order entered reversing the judgment of the district court. A motion is now made by the appellees to vacate such judgment or order for the reason of certain errors of judgment alleged to have been committed by this court in arriving at such decision.

E. P. Johnson, for plaintiff.

D. M. McLaughlin, for defendant.

By the Court, THOMAS, J.: There is no question brought up by this motion but what was raised or could have been raised upon the argument of the appeal in the first instance before the supreme court. For if this court passed upon the issues in the cause, as alleged on this motion, raised by the amended petition herein it must either have considered the whole matter fully as connected with such amendment, or else the counsel for the defendants and appellees failed to raise the question upon the argument of this cause of the right of the district court to allow the amendment of the petition at the time stated in these motion papers.

Therefore, if in the first place the court erred in its decision, it is clear that the only course for the appellees in this

Statement of Facts.

case to pursue would be by appeal to a higher tribunal, and not by a motion, the purpose of which is to induce this court to reverse its own decisions after a final hearing, or to hear a matter in the nature of an appeal from its own judgments.

2. If, upon the argument of the appeal herein before the supreme court, the counsel for the appellees failed to raise the question of the right of the court below to grant an amendment of the petition at the time in the proceedings stated, he is certainly precluded by the rules of practice from raising the question or other questions affected thereby after the case has been submitted on argument, or in the manner now attempted by him.

The motion is overruled.

FEIN v. THE UNITED STATES.

CRIMINAL PROCEDURE.—An indictment having been found against the plaintiff in error under the section of the U. S. statutes which provides: "And any brewer who shall neglect to keep books, * * * shall for every such neglect forfeit and pay the sum of three hundred dollars:" *Held*, on the hearing of the cause in this court, that the prosecution should have proceeded by civil action, and not by indictment.

ERROR to the Second District Court.

This cause came on for trial in the district court of the second judicial district, upon an indictment against John J. Fein, charging him with having violated the revenue laws of the United States by a failure to keep certain books correctly, that by said revenue laws all brewers are required to keep.

The defendant demurred to the indictment, on the ground that it did not state facts sufficient to constitute an offense punishable by the laws of the United States. The demurrer was overruled, and the defendant entered a plea of not

Argument for Plaintiff in Error.

guilty. The cause was tried, a verdict of guilty returned, and Fein was sentenced by the court to pay a fine of three hundred dollars.

The errors relied on by counsel for plaintiff in error were : 1. Overruling the demurrer ; 2. The refusal of the court to permit the prisoner to testify in his own behalf.

M. C. Brown, for plaintiff in error :

I. Overruling defendant's demurrer to the indictment.

II. The refusal by the court to grant a new trial as prayed for in his said motion, and herewith the refusal of the court to allow the defendant, now plaintiff in error, to testify to or to make a statement to the jury.

As to the demurrer, the court evidently erred, because the statute of the United States does not declare the failure to keep books, to be either a felony or a misdemeanor : See U. S. Statute under which indictment was found, p. 104, sec. 21 of Rev. Law. The same law provides that brewers shall give a certain bond, one of the conditions of which said bond is, the books referred to, to be kept by law, shall be correctly kept, etc. : See U. S. Rev. Stats. p. 102, sec. 17. The law claimed to support this indictment simply provides that if brewers fail to keep certain books, etc., they shall forfeit and pay the sum of three hundred dollars : See statutes before referred to.

It will be seen the law neither declares this act to be a crime or misdemeanor, or fixes a fine to be imposed. There is a wide distinction in the meaning of the words, fine and forfeiture, used in law. In criminal law, says Bouvier : " Fine is pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor : " 1 Bouvier's Law Dic. 589. It is the end of a suit, and never imposed until after trial. A forfeiture under the English law, made without trial. It is a recompense for wrong that a person or the public, together with himself, hath sustained : 2 Black. 267.

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Under article III, section 8, constitution and the laws of the United States (Act of 1790, sec. 24), forfeiture for crimes is nearly abolished. It will be observed that while the constitution enacts that "excessive fines" shall not be imposed, there is no such restrictions as to forfeitures: See Amendment to Constitution, art. 8.

Again, it will be observed that this statute is enacted by the United States as a revenue law, and not as a penal statute. It is only penal as to certain parts, and where so clearly and definitely expressed. No crime can be created by a statute by inference, presumption or construction: Bish. Stat. Crim. 220. Where there is a doubt whether it was the intention of the law maker, by the language of the statutes to create a crime, the party accused should have the benefit of the doubt: Bishop's Crim. Law, vol. 1, sec. 249.

As brewers are required to give bonds, and one ground of forfeiture of bonds is a failure to keep these books, can it be fairly claimed that it was the purpose of the law-making power to fix an additional penalty for so simple an offense. The bond stands as a contract between the United States and Fein and his sureties; if the indictment in this case is sustained, Fein and his sureties could be sued in a civil action on his bond, and in addition to the forfeiture of three hundred dollars and costs of this suit, he might be compelled to pay the penalty of the bond fixed at five hundred dollars. Certainly Fein could not plead the judgment in a criminal prosecution as a bar to suit on bond. Clearly the sum of eight hundred dollars as a fine or penalty for an act so trivial in itself would be considered excessive under the constitution, and not permitted.

Again it will be observed that the revenue law provides that when complaint is made to recover a forfeiture imposed by the statute on information of any person, the defendant may testify: See U. S. Rev. Law, sec. 179, p. 124; also, sec. 41, p. 123. It is true, this is in a civil action, but we claim that a forfeiture of the character referred to in the

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indictment can be recovered in a civil action only, and not by indictment and criminal prosecution.

In this action it is attempted to recover a forfeiture, and where a forfeiture is to be recovered, the law allows the defendant to testify. In his case, he was not permitted to testify, and we say the ruling of the court as to thus excluding the defendant, now the plaintiff in error, from this privilege, was erroneous, not under the general rules of criminal evidence, but because of the misapplication of the law in sustaining the indictment, and, therefore, applying the rules of criminal evidence to this case, and thereby deprived the defendant, now plaintiff in error, of this right and privilege, clearly intended to be given by the law in such case.

E. P. Johnson, for defendant in error.

The errors relied on are: 1. Overruling demurrer to the indictment; 2. The refusal to permit defendant to testify or make a statement under the territorial law.

This law provides for its violation a punishment. It need not declare the violation to be either felony or misdemeanor. The penalty may be recovered in a civil action possibly, but that does not bar a criminal prosecution. The remedies are cumulative: 1 Whart. Cr. Law, sec. 10; 15 Wend. 267. The second error depends on the first.

By the Court, CAREY, J.: The plaintiff in error at the August term of the district court of Albany county was indicted, tried and convicted, and sentenced to pay and forfeit to the United States the sum of three hundred dollars for neglecting to keep books as a brewer, as is required by law. A number of exceptions to the rulings of the court below were taken, and are assigned as error, but the only question relied upon by the plaintiff in error is, whether an indictment is the proper proceeding to recover the forfeiture to which the plaintiff in error will be subjected if the judg-

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ment of the district court is permitted to stand. Section 19 of the act of June 6, 1872, Internal Revenue Laws, compilation of 1873, pages 103 and 104, provides that brewers, among other things, keep certain books. Section 21 of same act referring to section 19, provides that the failure and refusal to do, or cause to be done, any of the things required by law, shall subject the offender to the forfeiture of all the liquors, utensils, etc., used in making the same, and make him liable to a penalty not less than five hundred dollars, nor more than one thousand dollars, to be recovered with costs of suit, and such offender shall be guilty of a misdemeanor, and shall be imprisoned for a term not exceeding one year. An additional sentence of said section provides: "And any brewer who shall neglect to keep books, * * * shall, for every such neglect, forfeit and pay the sum of three hundred dollars." It is admitted that it was under this sentence of the section that the plaintiff in error was indicted, tried and convicted, and sentenced to pay the forfeiture.

While we are of the opinion that under the said sections 19 and 21 it is a misdemeanor for a brewer to neglect to keep the books required by said section 19, we are also of the opinion that on conviction for such misdemeanor the punishment inflicted must be imprisonment for a term not exceeding one year, and that the penalties and forfeiture therein provided must be recovered, if at all, in civil actions: See section 179, page 124, Internal Revenue Compilation, 1873 (section 9 of act of July 13, 1866).

Judgment of the district court reversed, and case remanded for further proceedings.

Argument for Defendant in Error.

IVINSON *v.* ALSOP.

PRACTICE—PROCEEDINGS IN ERROR.—It is the well established and invariable rule of the supreme court, that in proceedings before it in error, the record or transcript must contain all the material evidence given in the court below and bearing upon any question relied upon by the plaintiff in error.

MOTION FOR NEW TRIAL.—The record must also show that a motion for a new trial was made in the court below, raising all matters of errors and exceptions (upon which plaintiffs in error relied), and the motion overruled.

IDEM.—The evidence and motion for a new trial must be contained in the bill of exceptions. The bill must be signed within the time limited by law. The defect cannot be remedied and a motion to strike the petition in error from the files and to affirm the judgment of the district court will be sustained.

ERROR to the Second District Court of Carbon County.

This cause was decided on a motion of defendant in error to strike the petition in error from the files and to affirm the judgment of the district court, for the reason that fatal defects appeared in the record. A further statement of the case is contained in the opinion.

E. P. Johnson, for defendant in error, moves to affirm the judgment and proceedings of the court below without looking into the record further than to see that it presents no case for review:

I. Because the petition in error does not assign errors and present them for review in the manner required by law and the rules of this court. The petition is unaccompanied with a transcript of the proceedings sought to be reviewed. After the petition was filed, what purported to be a transcript was filed without leave, which does not in any manner comply with the rules of this court. The rules of court when adopted become part of the law governing the practice, which the court is bound to enforce as any other law. In absence of transcript and such transcript as is required, judgment should be affirmed: Laws of Wyoming. 1869, 685,

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686; Supreme Court, Rule 7; Laws of 1873, p. 124, secs. 685-6; *Dunham v. Benedict*, 1 Green. 74; *State v. Bond*, 2 Nev. 265.

II. All presumptions are in favor of the correctness of the proceedings of the court below. They will be presumed correct and right until error is affirmatively shown by the record: Powell on App. Proc. 125, sec. 17, 193, 200; *Courtwright v. Staggars*, Ohio St. 511; *Spurs v. Fortner*, 6 Iowa, 553; *Mackner v. Bemer*, 1 Green. 157; *Stockton v. City of Burlington*, 4 Green. 84.

III. By reason of the foregoing premises it will be seen that the court cannot go into the record and review proceedings unless the record contains all the proceedings. It cannot determine that the court erred in its instructions, unless the evidence be presented to enable the court to see whether the questions arose in the case and whether correctly or incorrectly presented. So one instruction standing alone as an abstract proposition, may appear to be erroneous without the modification of the other instructions, and if they are not presented in the record as well as the evidence upon which the instructions or rulings were based, then the presumption will be that there was evidence to sustain it, or that all the instructions together correctly presented the law, hence the necessity that the transcript contain the evidence and instructions and all of them. This transcript does not embrace a single word of testimony, or a single instruction as given by the court: Powell on App. Proc. 125 to 128 inclusive, 142 and 200; *Russell v. Ely*, 2 Black. 575; *Fuller v. Rubley*, 10 Grey, 285; *Ide v. Churchill*, 14 Ohio St. 372; *Youmans v. Caldwell*, 4 Ohio St. 72; *Evert v. The State*, 14 Ohio, 386; 1 Neb. 398; 44 Ill. 124; 2 Barc. Dig. 395; 1 Ill. Dig. page 247, sec. 50; *Horton v. Peacock*, 1 Wyoming.

IV. It is equally necessary that the record should present the evidence and instructions in full, as well as all questions in dispute, to show the appellate court affirmatively not only that error actually exists in the record but also that the error was material and injurious to the party complaining,

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for a judgment will not be reversed simply because there is error in the record, if upon a review of the whole record the judgment appears to be right and just. The court cannot determine whether the error was injurious to the party complaining on a review of the whole record, unless the whole record is before the court containing sufficient of the proceedings to enable the court to determine that fact: *Nash*, Pl. and Pr. 689; *Powell* on App. Proc. 189; *Courtwright v. Stagg*, 15 Ohio St. 511; *Spurs v. Fortner*, 6 Iowa, 553; *McDougal v. Flemming*, 4 Ohio, 388.

J. W. Kingman and W. W. Corlett, for plaintiff in error.

By the Court, THOMAS, J.: This is an action in replevin brought by said Iverson against said Alsop, in the district court of the second judicial district of the territory of Wyoming, sitting for the county of Albany, to recover the possession of four hundred head of cattle and one hundred and forty head of horses, all of the alleged value in the aggregate of the sum of ten thousand dollars.

The amended answer of the defendant contains a denial of the wrongful detention of said property, and averments that said property belonged to the defendant as assignee in bankruptcy of the estate of the late firm of H. Latham & Co., and that as such assignee he had sustained damage to the amount of ten thousand dollars by reason of the seizure of said property under the writ of replevin herein. The venue was changed by an order of court on application of defendant, from Albany county to the county of Carbon, and was tried, before Chief Justice Fisher and a jury, December 12, 1874.

The court ordered the jury to find for the defendant, and his damages were assessed by said jury at seven thousand three hundred and twenty-nine dollars and seven cents. A motion for a new trial was then made and overruled but was not incorporated in the bill of execution, and judgment was ordered upon said verdict. It is now sought by the plain-

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tiff to have the case reviewed in this court upon a writ of error, while the defendant in error moves to have the judgment affirmed for reasons of defects in the record.

The record in this case of the proceedings in the court below is not sent to this court in accordance with those rules of practice which have long been settled and established.

1. The transcript or record in this case was made up and filed in violation of the rules and decisions of this court in reference to practice therein; and which are in substance, that all evidence to or bearing upon the exceptions relied on by the plaintiff in error shall be set out in the record fully and specifically, and if instructions of the court are complained of, the instructions and all of the same must also be set forth *verbatim et literatim*.

2. Rule V of the supreme court of the territory provides as follows: "No case will be heard in court unless a motion for a new trial shall have been made in the court below, in which all matters of errors and exceptions have been presented, argued, and the motion overruled." In the suit before us the motion for a new trial was not incorporated in the bill of exceptions, and such bill does not contain any exception to the order overruling the motion for a new trial.

3. The record of the district court was not filed with the petition in error, but was filed several days thereafter with the clerk of the court, and without the permission of the court, whereas section 516 of the civil code of this territory provides that: "the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be revised, vacated or modified." Permission was subsequently given the plaintiff in error by the court to have such transcript amended, but the question was then neither raised nor decided as to the propriety of filing the transcript without permission several days after filing the petition in error.

For the reasons above mentioned, especially those contained under the first head of this opinion, it is impossible for

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this court to review in a proper and intelligent manner the proceedings of the district court. On many of the important questions in the petition in error, none of the testimony of witnesses whatever is given, and on the others the record is so defective, that although an attempt appears to have been made to return the evidence, the court cannot fully or sufficiently inform itself as to the rulings and decisions of the lower court upon the points complained of as error. Neither are those portions of the judge's charge to which exceptions are taken set forth in accordance with the rules of court nor in a manner that it can advisedly pass upon the same.

The judgment of the district court is therefore affirmed.

WOLCOTT v. FEE.

PRACTICE REVIVOR.—The statutes of Wyoming provide that the order of revivor in case of the death of a party shall be served and returned the same as a summons. A different method having been followed: *Held*, that the statutes must be strictly and literally complied with.

ERROR to the District Court for Albany County.

The opinion of the court contains a sufficient statement of the case.

E. P. Johnson, for plaintiff in error, contended that error had been committed by the district court in the following particulars:

I. Overruling motion to set aside the service of the order of revivor. It should be served and returned as a summons: Laws of 1869, p. 596, sec. 457; *Id.* p. 519, sec. 65; Nash Pl. & Pr. 1189.

II. The court erred in overruling defendant's motion for new trial, and in arrest judgment should not have been

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rendered on the verdict, for death of plaintiff abates the action. The law presumes a party deceased cannot, or at least ought not, practice in mundane courts; hence the abatement. In this case the death of plaintiff appeared on the record. The verdict was a nullity. It could not be amended in matter of substance, nor could a stranger be brought into the record by amending verdict. Amendments to verdicts, see authorities cited in briefs of parties: Code, p. 242, sec. 74; *Clark v. Irwin*, 9 Ohio, 131; *Patterson v. U. S.*, 2 Wheaton, 221; *Bellows v. Hollowel*, 2 Mason, 31; *Sergeant v. The State*, 11 Ohio, 472. The verdict was not sustained by sufficient evidence; no personal responsibility being shown: Story on Agency, secs. 302 to 307, inclusive.

III. The court erred in rendering judgment in favor of John Fee. It was not in conformity with the verdict: Laws of 1869, p. 592, sec. 436; Powell on App. Pr., p. 153, secs. 58-9. Under the evidence and pleading, judgment should have been for defendant, notwithstanding the verdict.

J. W. Kingman, for defendant in error:

I. As to the amendment of the verdict by changing the name of the defendant: See Code of 1873, sec. 133.

II. As to service of order of notice: See Code of 1873, secs. 58, 56, 61. The order is not the summons: Code of 1873, secs. 54, 56; Court Rules, secs. 58, 412, 507; Laws of Wyoming Territory, 1869.

III. The jury found by direction of the court that this contract was made with defendant personally, and not as marshal. The evidence warrants such a finding. The official character of the defendant was not in issue, and would not avail as a defense if it had been: 12 Gray, 401; 3 Wallace, 334; 2 Kent's Com. 632-3, note a; *Gill v. Brown*, 12 Johns. 385.

By the Court, FISHER, C. J.: This was an action brought

to this court by petition in error from the district court of Albany county.

Thomas Fee, who was plaintiff below, brought his suit in said court for the recovery of the sum claimed to be due him for work and labor done at the request of Frank Wolcott, the defendant, in and about the territorial penitentiary. During the pendency of said action Thomas Fee died, and letters of administration of the estate of Thomas Fee were duly granted to John Fee. The death of Thomas Fee was suggested by the attorney of record, and it was ordered that the suit be revived in the name of the administrator. A notice of revivor was allowed by the district court, which was served upon Wolcott, the defendant. At the next term of said court, being the February term, A. D. 1875, the defendant, by his counsel, appeared specially and moved to set aside the service of the notice of revivor, on account of informality in the service thereof, which motion, after argument, was overruled, and defendant, by his counsel, then and there excepted to the ruling of the court.

A jury was then called, and the evidence of plaintiff was submitted, and the jury retired, without any evidence having been submitted on the part of the defendant. The jury returned a verdict in the following words and figures, to wit: "*Thomas Fee v. Frank Wolcott.* We, the jurors, find a verdict for plaintiff, and assess the damages at two hundred and thirty-seven dollars (\$237). Laramie, February 8th, 1875. W. S. Bramel, foreman."

The defendant below, by his counsel, filed a motion in arrest of judgment, for the following reasons:

1. Because the verdict is not sustained by evidence, and is contrary to law, and upon which no judgment can be rendered.

2. Because the suit having abated by the death of Thomas Fee, no judgment can by the law of the land be rendered in his favor or against him. Which motion was overruled by the court, to which ruling defendant excepted.

Defendant filed his motion to set aside the verdict and

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grant a new trial, for the reasons herein set forth: The defect in the service of the order of revival; the insufficiency of the verdict. Which motion was overruled by the court, and exceptions taken. The case was then duly brought into this court upon the errors assigned in the court below.

The record in this case shows that Thomas Fee died during the pendency of the suit, and that a motion was filed for its revival in the name of the administrator. The statutes of Wyoming point out the proper course to proceed in the happening of such an event, viz., that the notice of revivor if not made by the consent of the parties, shall be served and returned in the same manner as of a summons; Laws of 1869, 596, sec. 457. The manner of serving a summons and its return is prescribed in the same book, 519, sec. 65. The record in this case shows that the provisions of the sections referred to were totally uncomplied with, hence there was a fatal defect in the service. The verdict of the jury is radically defective, and while it possibly might have been amended so as to conform to the facts proven under the provisions of the civil code of this territory, yet the record does not show that any offer of that kind was made. These errors being so apparent, it is not necessary to pass upon the other error assigned, viz., the insufficiency of the evidence.

The judgment of the district court is reversed and a *venire facias de novo* awarded.

Argument for Plaintiff in Error.

RUMSEY *v.* WOLCOTT.

BANKRUPTCY.—An employee of a United States marshal cannot sustain action against such marshal personally for services rendered in taking care of a bankrupt's estate, but should apply to the court of bankruptcy for relief.

IDEM.—If the marshal fraudulently refuses to pay his agent for services rendered, he (the agent) may apply to a court of bankruptcy for such relief as he may be entitled to.

IDEM.—Where a suit was commenced by an employee of the U. S. marshal to recover compensation for taking charge of the property of a bankrupt: *Held*, that a demurrer to the petition was properly sustained, on the ground "that the court had no jurisdiction of the person of the defendant or the subject of the action."

ERROR to the District Court for Albany County.

The opinion contains a sufficient statement of this case.

J. W. Kingman, for plaintiff in error, contended that the demurrer should have been overruled. The petition sets out the bond of defendants, and alleges as a breach the refusal of the marshal to perform a duty enjoined and required by law, in consequence of which the plaintiff sustained a pecuniary loss: See *Bump on Bankruptcy*, pp. 92, 199, 451; sec. 407, p. 463; sec. 47, p. 477; rules 12 and 13. It is not necessary to sue the officer first and the sureties afterwards: *Nash*, 189.

"The sureties of a sheriff are liable for his tortuous acts, done under color of his office:" 29 U. S. Dig. 114, sec. 34; 3 Bush, 516. "The sureties upon an official bond of a sheriff guarantee the faithful performance of official duty; and nothing but the faithful performance of official duty can fulfil the condition. As long as the obligation to pay continues an official duty of the officer, so long are his sureties responsible for its violation: *State v. Allen*, 12 Ohio, 59.

"For every non-feasance or misfeasance in office, the officer is responsible to the party aggrieved; and this is the liability to which the sureties have undertaken to respond:

Argument for Defendant in Error.

State v. Blake, 2 Ohio St. 147; *Ohio v. Jennings*, 4 Id. 418; Seney's Code, 698, secs. 8, 46, 51.

E. P. Johnson, for defendant in error.

This case comes up from Albany county. Plaintiff was (as is alleged) employed to look after and care for certain cattle taken by Frank Wolcott on a warrant in bankruptcy, Wolcott agreeing to pay what the services were reasonably worth. Plaintiff claims his services were reasonably worth something over a thousand dollars (the amount is immaterial), and brought suit to recover, not against Wolcott, but on the official bond given by Wolcott as marshal of the territory, the other defendants being sureties. A demurrer was filed to the petition, and also to the amended petition. The demurrer to the amended petition was sustained, and the case brought here to review that ruling, as no judgment has been rendered in the case as yet. It is submitted that the demurrer was properly sustained. An action does not lie on the bond except at the instance of some party who has suffered damage by reason of the failure of the marshal to perform some duty enjoined by law, or his misfeasance in the performance of such duty.

The petition fails to show any non-feasance or misfeasance by which Rumsey became a sufferer. On the contrary, it only shows that Rumsey is seeking to recover by action on the bond a sum claimed to be due on a simple contract to perform services for Wolcott.

An attempt is made to show breach of official duty by reference to Bump on Bankruptcy, 92-199; 451, sec. 40 d; 463, sec. 47; 477, and rule 12. But the authorities fail to show that Rumsey has any right in the court of bankruptcy, or is or can be known to the court, unless the court is called on by the marshal to allow to him as compensation out of the estate whatever he may have paid Rumsey for the care of the property, and then the court will examine to see if it is reasonable. The marshal may or may not

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return the bill he pays or becomes bound to pay. It is a matter depending on his own inclinations whether he will pay the expense he incurs out of his own pocket or ask the court to allow it to him out of the estate. He commits no breach of official duty if he chooses to pay it himself, and never trouble the court with it. The question is a simple one, and settled by the authorities cited by the plaintiff. No other questions arise that are necessary to its decision.

It might be urged that demurrer was good on the ground that the petition does not show judgment first against the principal, and that execution was returned unsatisfied, but the first point is decisive and disposes of the case.

By the Court, FISHER, C. J.: This was an action brought to this court by petition in error from Albany county, of August term, A. D. 1874.

Frank Wolcott, defendant in error, was United States marshal for the territory of Wyoming, and as such, and as messenger in bankruptcy, took into his possession a certain lot of cattle claimed to belong to the bankrupt estate of H. Latham & Co., by virtue of certain proceedings and orders duly issued to him by the supreme court of said territory sitting as a court in bankruptcy. That the said Wolcott employed Henry R. Rumsey, plaintiff in error, to take charge of and agist said cattle from some time in the month of January until April, A. D. 1874. That on failure of Wolcott to pay Rumsey the amount alleged to be due for said services, said Rumsey brought suit against the said Wolcott, on his official bond, including the sureties in the action. The petition of the plaintiff in the court below, and plaintiff in error here, sets out the matters above stated as his cause of action.

The defendant in the court below, by his counsel, filed a general demurrer, which was sustained by court. The plaintiff brings his case here by petition in error and assigned as the only error the sustaining of the defendant's

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demurrer. The question, therefore, for this court to determine is, should the demurrer have been sustained? The plaintiff's petition, which is a part of the record in this case, shows that his claim is for the custody and agisting of the cattle taken into custody of the marshal, and can only be allowed by the court sitting in bankruptcy upon the presentation in the form of a schedule of costs and expenses actually incurred and paid by the marshal, and cannot be allowed to his deputy or any one else, unless in cases where the deputy is performing all the services as marshal, and his account is made up accordingly: See Bump on Bankruptcy, pages 199 and 463. And the court cannot take into consideration the account of either the marshals, deputies or agents while the marshal himself is present, and acting or performing the duties appertaining to his office.

The law gives no right to any employee of the officer to present his claim in person to the court for allowance, hence if the marshal employs an agent to take property into custody for any other purpose, the agent accepts the trust at the hands of that officer, subject to his own risk, and must look to him for his compensation. If the marshal fraudulently refuses to pay his agent for services rendered, he (the agent) may apply to a court of bankruptcy for such relief as that court may be able to afford him, but even then we conceive that it would be in the discretion of that court.

But we fail to see where any relief can be granted by any court other than a court of bankruptcy. Nor can a suit in any case be sustained upon the official bond of the marshal for a breach of its conditions, for such a claim as is presented in this action.

The civil code of Wyoming, section 85 of the act of December 11, 1873, gives, among other grounds of demurrer, "that the court has no jurisdiction of the person of the defendant, or the subject of the action." Now, if the claim of the plaintiff in this case can only be presented through the marshal, and in a bankruptcy court, it follows *a priori* that the district court can have no jurisdiction, and that the

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action, if brought, must be against the marshal on his contract, and not against him and his bondsmen in any official capacity.

The ruling of the court below in sustaining the demurrer is therefore sustained, and the defendants discharged with their costs.

DAYTON v. THE WYOMING NATIONAL BANK.

EVIDENCE.—An affidavit made in the action by a witness on a former occasion, simply showing contradictory statements, cannot be introduced as evidence on the cross-examination of such witness, except for the purpose of impeachment.

IDEM.—To impeach the testimony of a witness in that manner, it is necessary to call the attention of the witness to his previous statements, by definitely fixing time, place and circumstances.

REPLEVIN.—Where a sheriff was sued in replevin for property taken by him as such sheriff, under certain writs of attachment: *Held*, that it was unnecessary for him to prove on the defense that he was in every respect the qualified sheriff of the county; it was sufficient to prove that he was the sheriff *de facto* of such county.

IDEM.—Nor that it was necessary for him to prove, in order to establish his right to hold the property under such writs, that the attachments were issued on valid and *bona fide* claims.

IDEM.—The sheriff need not go behind the face of the papers. If they have been issued in due form from a court of competent jurisdiction, he will be protected.

IDEM.—The plaintiff in a suit in replevin must prove the ownership, in a right of possession to the property, by a preponderance of evidence.

IDEM.—He cannot make out his case by attacking the defendant's title.

ERROR to Second District Court, for Albany County.

The defendant in error, plaintiff in the district court, commenced an action in replevin against the plaintiff in error, defendant in the district court, for the recovery of the possession of five hundred cords of fire-wood. The petition alleged that the plaintiff was the owner of said wood, and was entitled to the immediate possession thereof; that the defendant wrongfully and unjustly detained in his possession the said

Statement of Facts.

wood, and had so detained the said wood for the period of thirty days, to the damage of the plaintiff in the sum of five hundred dollars.

The defendant, for answer to the petition: 1. Denied the petition generally; 2. Denied that the plaintiff was the owner of the wood in question; that the plaintiff was entitled to the immediate possession thereof; that the defendant ever took or held the wood in question; and that the defendant ever unlawfully detained the possession of the said wood from the plaintiff; 3. The defendant alleged, that as the lawful sheriff of Albany county, and by virtue of certain writs of attachment issued out of the district court of said county, directed to him, the sheriff of said county, against one W. S. Brammel, he levied upon said wood as the property of said Brammel, and took the same into his possession; that at the time of said levy, the said Brammel was the owner of and in the possession of said wood, and that by reason of said levy, he, the defendant, as sheriff, had a special property in said wood to the amount of two thousand three hundred dollars, for which he prayed judgment.

No replication appears from the record to have been filed to this answer. The wood in question, on the writ of attachment, was delivered to the plaintiff. The evidence offered showed that the plaintiff claimed to be the owner of the wood by reason of an alleged purchase of the wood of W. S. Brammel, the defendant in the writs of attachment previous to the issuing of said writs. A number of important questions were raised by the testimony, among which were: Whether the plaintiff ever purchased the wood in question? Whether the wood was in the possession of the said Brammel, or in the possession of the plaintiff at the time the same was attached? There was conflicting testimony upon each of these questions. The jury under the instructions of the court found for the plaintiff in the court below, and assessed the damages at four hundred and twenty-six dollars, and after motion for a new trial interposed by the defendant in the court below was overruled, a judgment

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was rendered on the verdict for the plaintiff. A large number of exceptions were taken in the court below to the rulings of the presiding judge, which are the basis of the petition in error.

E. P. Johnson and M. C. Brown, for plaintiff in error, contended that there was manifest error committed by the district court in refusing to admit the affidavit of the witness Ivinson, in admitting other testimony, and to the charge given to the jury and cited on the question of evidence: 1 Greenl. sec. 449; 2 Phill. 912; 1 Greenl. 442. And on the question of instructions: 2 Nash, 834; Hill. on Rem. for Torts, 30, 53, 97; 1 Phill. on Ev. 592; 1 Pars. on Cont. 475; Chitty on Cont. 8; *Baltis v. Hamlin*, 22 Wis. 669; 2 Nash, 112; *Williams v. West*, 2 Ohio St. 82; Sedg. on Dam. 453; Laws of Wyoming, 543; Powell on App. Proc. 145 *et seq.*; 5 Ohio, 338.

J. W. Kingman, for defendant in error, cited: Hill. on New Trials, secs. 39, 55, 55; Thompson on Prov. Rem. 144, 153; *King v. Barrett*, 11 Ohio St. 261; Seney's Code, 426, 443; Bell's Dig. 523; Crocker on Sheriffs, 865; Drake on Attach. 290; 2 Mass. Dig. 59.

By the Court, CAREY, J. The first question presented is: Did the court below properly refuse to permit the plaintiff in error to introduce on the trial as evidence an affidavit for continuance, that theretofore had been made by the witness Ivinson, agent for the defendant in error, and filed in the case? This affidavit could only have been introduced on the trial for one purpose; namely, to show that the said Ivinson, as a witness for the defendant in error, had made statements in the affidavit for continuance, contrary to those testified to on the trial, and thereby impeach the testimony of the witness. To impeach the testimony of a witness, it is necessary to call the attention of the witness to his previous statements, by fixing the time, place and circumstances. This rule is a wise one and should be followed.

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It is simple justice to the witness. If his mind is directed to the particular circumstances and occasion, he may not only recollect but satisfactorily explain his previous and apparently contradictory statements. In this case the foundation was not laid to impeach the testimony of the said Irvinson, and the court properly ruled out the affidavit: 1 Greenleaf's Evidence, sec. 462. Another error assigned, is that the court below permitted the witness Charles Hutton, called by defendant in error in rebuttal, to answer the following question: "Did Brammel point out to you two piles of wood; if so, what did he say?" This question we consider objectionable. Brammel was not a party to the suit, and whatever statements he made to Hutton were hearsay. Since Brammel had been called as a witness by the plaintiff in error, the statements made to Hutton might have been related by Hutton to impeach and weaken the testimony of Brammel, if the foundation for such impeachment had been made, but as no such foundation was laid, the question should have been ruled out.

The court, at the request of the defendant in error, instructed the jury: "That the sheriff must establish by clear proof every fact requisite to give him the right to attach, to wit: 1. That he is the duly qualified sheriff of the county; 2. That a just debt existed in each of the attachments; 3. That a legal ground for an attachment existed; 4. That he made and kept by a legal possession a *bona fide* levy; 5. That the attaching creditors can get only such title as Brammel had at the time of the attachment, and if he had sold the wood either to the railroad company or the bank, and got his pay for it, the officer had no right to take it."

We are of the opinion that the foregoing instructions should have been refused by the court. While under a different state of circumstances they might have been applicable, we do not consider that they should have been given under the pleadings and evidence in the case without qualification. None of the propositions contained in the said instructions were raised by the pleadings, as no replication

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was filed denying the special answer of the sheriff in reference to his holding the property in question on certain writs of attachment.

These instructions, without qualification, shifted the affirmative of the case from the plaintiff to defendant, and could not have done otherwise than have misled the jury. It is not necessary for an officer to produce the certificate of election or commission of appointment to show his official character. Proof that he has acted notoriously as such officer is *prima facie* evidence of his official character. All who have proved that they have acted as public officers are presumed to have been duly appointed or elected until the contrary appear: 9 Wend. 17; 1 Green. Ev. secs. 83, 92. Whether the debts in the attachment suits were just, or whether the ground upon which the attachment writs issued were legal, were not questions raised by the pleadings.

Another instruction given by the court below and assigned as error is as follows: "That payment of the purchase-money perfects a contract of sale as effectually as delivery of goods." This is the law as to the parties to the contract, but not as to third parties. Section 2 of "an act to prevent frauds and perjuries," Laws 1871, p. 77, expressly provides that the payment of purchase-money for personal property makes such contract a valid one; but we are of the opinion that the statute did not change the law as it existed previous to its passage, so far as the rights of third parties are concerned, and that the law in reference to the sale of chattels where the possession does not accompany the sale, so far as the rights of third parties are concerned, is the same as it existed under the statutes of frauds of England. The laws of this territory in reference to chattel mortgages (Laws 1869, chap. 66) provides, it is true, that personal property may remain in the possession of the mortgagor for the period of one year after the mortgage is recorded if the mortgage shall so provide, but the law only applies to mortgages and other conveyances that have the effect of mortgages and not to absolute sales.

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The law in reference to absolute sales, when the possession does not accompany the sale, has given rise to different opinions in different states.

In Pennsylvania, New Jersey, Vermont, and other of the states, it has been held that on sale of chattels possession must accompany the sale, or it is fraudulent in law, although there is no fraud in fact: 5 Serg. & Rawle, 275. In Massachusetts, New Hampshire, Ohio, and other states, it has been held that the remaining in possession after sale is *prima facie* evidence of fraud. Unexplained the retaining of possession after sale would be held fraudulent, but such possession is not held to be exclusive evidence of fraud in itself: 9 Ohio, 153. The latter rule appears to be the prevailing rule, and should be followed in our courts. The court also instructed the jury "that the passing upon the evidence of the contract alleged to have been made by Brammel with the officers of the bank, the jury are to be governed by the weight of testimony, and the language used by Brammel when he got the four hundred dollars, is to be taken as it was understood by the bank, and not as Brammel might have understood it." This instruction was clearly erroneous. The contract, if there was one, was not what one of the parties understood it to be, but what both assented to. There is no contract unless the parties, not one of the parties, assent to. And they must assent to the same thing in the same sense: 1 Parson's Con. 475-80.

The following instruction was requested by the defendant in the court below, and refused by the court: "It devolves upon the plaintiff in the case (defendant in error) to prove the title and ownership of the property taken on the writ of replevin to be in the plaintiff by a preponderance of evidence, and if the evidence shows that title to the property in question at the time this suit was commenced was in any person other than the plaintiff, the Wyoming National Bank, the plaintiff fails in his case, and the verdict must be for the defendant." This instruction should have been given to the jury. The judge who tried the case appears to have fallen in error in considering the

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question at issue to be whether the defendant unlawfully took the property in question, when the real question was whether the defendant unlawfully detained the property from the plaintiff.

The important questions presented under the laws of this territory on the subject of replevin (Civil Code, Laws 1869, sec. 186), are: 1. Is the plaintiff the owner of the property in question, or has he a special ownership or property therein? 2. Is he entitled to the immediate possession of the property? 3. Is the property wrongfully detained from him by the defendant? The plaintiff to recover must establish the affirmative of each of these propositions by a preponderance of testimony. If he fails to maintain either of these propositions, the verdict of the jury should be for the defendant. Unless the plaintiff in the court below was the owner of the property in question as alleged, the action of the sheriff, though it may have been wrongful as against Brammel, Iverson, or the railroad company, could not be taken advantage of by the plaintiff. The plaintiff in an action of replevin must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant: Hilliard on Remedies for Torts, p. 30, sec. 6.

The court also instructed the jury that "in addition to the actual damages sustained by the plaintiff, if the taking of the sheriff was wrongful you may assess such exemplary or vindictive damages, as a punishment for the wrongful taking, as you think just and proper under the circumstances." Section 196 of the code of civil procedure, laws of 1869, provides, where the property has been delivered to the plaintiff, as in this case, the jury shall assess adequate damages to the plaintiff for the "illegal detention" of the property; not for the "wrongful taking." The section does not authorize vindictive damages, but adequate damages, or, in other words, such damages as the evidence shows the plaintiff has sustained. There are other errors assigned, but we deem it unnecessary to consider them at this time.

Judgment reversed and new trial ordered.

Argument for Complainant.

IVINSON *v.* HANCE ET AL.

MUNICIPAL CORPORATIONS—PERSONAL PROPERTY.—Village lots to which no title has been derived from the United States are not property that should be assessed, but improvements thereon may be assessed as personal property.

CITY WARRANTS.—The board of trustees or managing officers of a municipal corporation may issue warrants upon the treasury, to be used as evidences of indebtedness, although there is no money in the municipal treasury at the time, and although not specially authorized so to do by the city charter, under which they were proceeding.

TAXES.—Taxes cannot be levied upon lands to which the title yet remains in the United States.

COURTS OF CHANCERY—TAXATION.—Courts of chancery may interfere to restrain the collection of taxes, but only where a cloud may cast upon the title of real estate, or irreparable injury committed.

APPEAL from the District Court for Albany County.

A full statement of the case appears in the opinion of the chief justice.

J. W. Kingman, for complainant.

I. As to jurisdiction in equity to restrain the levy and collection of illegal taxes, and the illegal disbursements of public funds: See Dillon, 677, 693.

II. As to the purposes and powers of municipal corporations: Dillon, 17-25, 28, 153.

III. These corporations have no powers, except such as are expressly granted: Dillon, 101 *et seq.*; Cooley's Const. Lim. 194-197, and notes.

IV. As to their power to tax: Dillon, 560-3-4, 576, 580; see plaintiff's bill, 1-5; City Charter, secs. 27, 29.

V. What is taxable property in this territory and under this charter: Dillon 583, 591; Cooley's Const. 499, 501, 515; 10 Wis. 187, 206; see bill, 1, 2.

VI. As to the method of passing ordinances, first notice: Dillon, 251, 273, 282; second publication: Dillon, 286; Stat.

Argument for Defendants.

of 1869, 206, sec 16. Must be subordinate to general laws and conformable thereto: Dillon, 284, 308; Cooley's Const. 198, 370.

VII. An intentional omission of taxable property vitiates the whole tax: 10 Wis. 187, 206; 16 Wis. 118.

VIII. As to the limitations of the power to tax: Cooley's Const. 518, note; City Charter, 206, secs. 15, 18; City Charter, secs. 23, 26; Cooley's Const. 520, note; Dillon, 580.

M. C. Brown, for defendants.

This case stands on the bill, demurrer, affidavits, and certain agreed facts. The point to be considered and determined is as follows: Are the facts presented by the record in this case sufficient for the court to order a perpetual injunction to restrain the city trustees from enforcing the tax ordinances of the corporation of Laramie City and the collection of the tax assessed under and by virtue of the authority of the said ordinances and the said board of trustees?

As to the first point, that the board did not determine the amount of the tax for the current year before the third Tuesday of May, we claim the statute is directory merely, and that a determination of the amount of tax after that time does not invalidate the tax: *Gearhart v. Dixon*, 1 Penn. St. 224.

In reference to the second point that the description of the property assessed is not in accordance with law, the bill alleges that the laws of the territory require certain things to be done and a certain formula to be followed, and that we did not do it in that way. The bill does not allege what we did do and show wherein we erred, but states negatively a legal conclusion. To sustain the proposition that a conclusion of law is not a fact to sustain a bill of complaint needs no citation of authorities. But if the matter was stated in a proper form, we claim that the statute is directory in its terms: Laws of Wyoming, 1869, ch. 28, sec. 33.

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As to the third point urged by complainant, which is in reference to the neglect of the assessor to assess town lots and assessing buildings and improvements thereon; it is admitted by the record and was so agreed in the lower court, that no patent has issued by the United States for any of the lands or lots within the corporate limits of said town of Laramie City. Since, then, no patent had issued for any of these lands, we conclude title to the said land is yet in the United States. If title is in the United States, then the lots could not be assessed, and the improvements thereon must be assessed: Laws of Wyoming, 341-42; *Counties of—, in Nebraska v. U. P. & C. B. & Q. R. R.*, decided by Dillon in the U. S. Circuit Court; 3 Ohio State.

Again, if the court holds that the errors in the assessment are such as to make the assessment wholly void, then there is no ground for perpetual injunction, or to restrain the collection of the tax by sale of personal property levied on by the collector: 2 Dill. Mun. Corp. 839; 55 Conn. 232; 24 Mo. 20; 17 Id. 474; 29 Wis. 51; 21 Id. 44; 28 Id. 583; 2 Cal. 590; 4 E. D. Smith, 675; 6 Cal. 273; 12 Id. 298-99; 33 Barb. 322; 23 Miss. 443; 22 Ill. 34, 303, 574; 4 Barb. 9, 17; 25 N. Y. 312; 22 Miss. 90; 26 Ill. 610; Hill. on Inj. 458.

We further claim that all other matters in the bill are objectionable on the grounds of impertinence and multifariousness: Story's Eq. Pl. secs. 266-7; 1 Daniels Ch. Pl. 341, 356.

By the Court, FISHER, C. J. This was a bill in equity filed in the district court of Albany county, of September term, A. D. 1874, to restrain defendant from collecting certain taxes levied by the board of trustees of Laramie City for municipal purposes. To which bill the defendants filed a general demurrer, which was overruled by the court. The counsel for the respective parties then entered into a stipulation to submit all the matters in controversy to this court at the March term, A. D. 1875, so that the question to be

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determined is, should the demurrer have been sustained or not?

The stipulation of the parties sets out that at the date of the act of incorporation of Laramie City, the title to the land on which the town was built was still in the United States and was part of a military reservation, that the boundaries of the reservation have been decreased so as to have the incorporated portion without the bounds of said reservation, but that the title to the lands in question had not been changed but still remained in the government.

The question therefore arises as to whether the town lots in the possession of citizens are subject to taxation as real estate. It is also agreed that in levying taxes unimproved lots were not listed and assessed for purposes of revenue, and that where lots had been improved by the erection of buildings that said buildings were listed and assessed as personal property. It is further stipulated that certain indebtedness existing against said city arose from the issuance of city warrants in regular form by the board of trustees of said city. It is claimed in plaintiff's bill that the city trustees exceeded their authority by the issuance of city warrants, thus creating a debt without complying with the terms of the city charter, and that they claim that a court of equity has jurisdiction to restrain the collection of taxes for this reason, as well as for the reason of the non-assessment of the real estate. They also complain of certain irregularities in the proceedings of the trustees, and of the city marshal in the attempt to enforce the collection of the taxes by restraint of plaintiff's property.

The foregoing are the main questions upon which the decision of this court is invoked. The act of congress entitled "An act to provide a temporary government for the territory of Wyoming," approved July 25, 1868, sec. 6, provides among other things that "no law shall be passed by the legislature of said territory interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States." And the legislature, at its ses-

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sion of 1869, passed an act entitled "An act to provide a territorial and county revenue, see laws of 1869, pp. 340-1-2. The third section of which provides that all property, real and personal, within this territory is subject to taxation in the manner herein directed, and this section is intended to embrace lands and lots in towns, including lands bought from the United States, whether bought on credit or otherwise; buildings or improvements erected upon lands the title to which remains in the United States, or in any incorporated company." If the enumeration of things in particular excludes things in general, then there is no room to doubt that there is no power given to either the territorial legislature, or any municipal corporation within the territory, to tax the lands the title to which is in the United States, and that they are expressly prohibited by the sixth section of the organic act from the assessment or collection of taxes from lands so long as the title remains in the United States. And the legislature certainly took the same view of the question when they passed the third section of the revenue act of 1869. This question being so fully settled by those enactments, it would be a waste of time to examine it further.

It is true that the learned counsel for the plaintiff have cited a large number of authorities upon the subject of taxation, all tending to show that all property should bear its equitable share of the expenses of government, but as long as the prohibitions in the act organizing the territory, and the act providing for the raising of revenue are on the statute books, it is labor in vain to talk of the equities of the case. The next question submitted is, as to the power of the trustees of the city of Laramie. The eighteenth section defines the power and duties of the said trustees very fully, and this and other sections of the act of incorporations gives them power to levy and collect such an amount of taxes as may be required to conduct the affairs of the city, and in the imposition of the taxes they are to be governed by the territorial laws.

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While the twenty-third section provides that the trustees shall not incur any debt or borrow money for the use of the city without having the concurrence of five eighths of the taxable property owners, to be ascertained by a petition for that purpose. Now, what is the meaning of this section? Does it mean that no work shall be done on the streets, nor anything done by which a debt shall be created against the city until five eighths of the citizen taxpayers shall first apply by petition to have such work done? Surely not. Statutes are to be construed in a reasonable manner, and where there appears to be something conflicting, we are to compare one part by another, and in this way inquire into the will of the legislature in the passage of the statute, so that if the conflict be not so great as to destroy the whole force of the law, we are to interpret it so that the whole may stand: See 1 Blackstone, ch. 1.

Now, what was the intention of the legislature when they passed the law incorporating the city of Laramie? Did they intend to say that no debt should be created by street improvements, fire and water regulations, the providing places in which to keep prisoners, the pay of the marshal and other officers, without first having a petition signed by three fifths of the taxable citizens? Surely not. What, then, is meant by the prohibition contained in the twenty-third section? Simply that no extraordinary expenditure of the funds of the city should be made, or permanent debt be created by borrowing money on the credit of the city, without such permission being first had and obtained. Otherwise, how could the ordinary expenses of the corporation be met? We, therefore, think there can be no doubt that the trustees of Laramie city were fully empowered, under the terms of the city charter, in levying and collecting a tax sufficient to meet the ordinary expenses of the corporation. There was another question raised on the argument of the case, although not embraced in the written stipulation of the parties, and that is, as to whether the trustees proceeded in the proper manner to make the assessment. Of this there is some

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doubt ; but inasmuch as it is not fairly presented to us, nor do we consider it as appealing to a court of chancery for relief, we do not feel called upon to more than give it an incidental notice.

The only question remaining to be considered is that of the jurisdiction of the court sitting in chancery to pass upon the question of the collection of taxes, so as to call for interference by injunction. This question has been so frequently passed upon that it should be governed by the rule *stare decisis*. It is but seldom that courts of equity will interfere by injunction to restrain the collection of taxes, even where they have been illegally assessed. There are cases, however, where courts of equity will interfere. Such as where there is no complete remedy at law ; where a cloud may be cast upon the title to real estate by a sale for taxes ; where the parties collecting an illegal tax are wholly irresponsible, or where a multiplicity of suits would result from an appeal to a court of law. But we fail to see in the case at bar wherein either of these points arise. First, we have seen that the cause of complaint of the non-assessment of the realty embraced within the bounds of the corporation is removed by the provisions of the organic act of the territory and laws of the territorial legislature ; Second, that the trustees are fully justified by the provisions of the charter to levy and assess a tax, reasonable in amount, to meet the ordinary expenses of the municipal government, and there is not even a complaint that the rate of assessment is too high.

There, of course, cannot be any such thing as a cloud upon the title, and there is nothing in the stipulation or record which justifies the conclusion that a multiplicity of suits are likely to grow out of the collection of the taxes ; and as to the legality of the assessment, that can be settled in a court of common law jurisdiction—by an appeal which performs, under the laws of this territory, the same office as *certiorari* at common law, or the writ of *certiorari* itself can be resorted to, even though no statutory provision has been made for its issuance, because our statutes provide

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that in the absence of statutory provisions, the common law remains in full force. We thus have arrived at the conclusion that there is nothing in plaintiff's bill which entitles him to relief in a chancery proceeding, from the fact that ample relief may be found in the common law side of the court, and that but for the stipulation of the parties by which the case was brought here for adjudication, the court below would have been justified in sustaining defendant's demurrer.

The plaintiff's bill is dismissed.

IVINSON *v.* PEASE ET AL.

PRACTICE, JUSTICES' COURT APPEALS.—The statutes of Wyoming prescribe how a judgment of the court of a justice of the peace may be reversed. The law must be strictly followed, or the appellate court will not obtain jurisdiction. No other proceedings can give jurisdiction.

COMPOUNDING FELONIES.—Neither a justice of the peace, prosecuting witness, nor prosecuting attorney, possesses the power to compromise felonies.

ERROR to the Second District Court for Albany County.

The plaintiff in error, who was prosecuting witness in a case of felony, on the preliminary examination before a justice of the peace, allowed judgment to be entered against him for costs, and the proceedings to be dismissed; but finding, after the time had expired for appealing from the justice's judgment, that the costs taxed were, as he, the prosecuting witness deemed, excessive, he attempted to have the matter reviewed on petition to the district court.

J. W. Kingman, for plaintiff in error.

The statute of 1873, secs. 511, 512, provides for the remedy sought in this case, both in the district and in the su-

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preme courts. Section 25 of the criminal code provides to whom the justice shall direct his warrant, and gives him no power or discretion to direct it to any one else. Page 163, sec. 5, chap. 4, statutes of 1869, prescribes the duties of sheriffs, and does not include the service of warrants from a justice of the peace. Secs. 2 and 9 of chap. 33, prescribe the fees of sheriffs and constables, and a different rate is provided for each, in which the sheriff is allowed a higher rate than a constable.

The statute nowhere empowers a justice of the peace to tax costs against the complaining witness, in cases of felony; and even if in this case he promised to pay costs, it could afford no ground of suit or claim against him, because it would be a violation of sec. 89 of the Crimes Act, in relation to compounding felonies, and therefore void. But the flagrant wrong in this case consists in the unnecessary and reckless accumulation of costs, to the great oppression of the plaintiff, if he has to pay them, and to the willful plundering of the public, if the county must bear the burden.

The county attorney cannot charge fees in a case where there is no trial, "for examination." Such fees were allowed in each of the five cases, in this bill of costs, amounting to seventy-five dollars: Crim. Proc. Act, sec. 78.

Bramel, Brown and Johnson, for defendants in error.

This is an appeal from a judgment of the district court in an original case commenced in that court, to supervise the action of a justice and modify his judgment as to costs.

Defendants rest this case on two settled propositions of law, which have no reference to the merits of the justice's judgment: 1. The evidence having been incorporated into the transcript, the presumption is that there was evidence to support the judgment of the court below. The presumption is that the judgment was right, unless error affirmatively appears; 2. This seems to have been an original case in which the court was asked to revise the justice's judg-

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ment; and it is submitted that the court had no jurisdiction to do so, unless the case came up in the manner provided by law, and that it so affirmatively appears it did not; and this court should render the same judgment that should have been rendered in the court below, to wit: Dismissal of the bill, or petition as it is called.

By the Court, CAREY, J.: This is what purported to be a proceeding commenced before associate Thomas, in vacation, to re-examine, recharge and retax certain costs taxed by L. D. Pease, justice of the peace (one of the defendants in error), in Albany county, in certain prosecutions which had been instituted by the plaintiff in error against one Thos. Alsop and others, charging them with the commission of certain felonies.

The record in this case presents a strange state of facts. It appears that after the said prosecutions for felony had been partially examined, the witnesses for the prosecution were induced to leave the court-room, and that the prosecuting witness, the prosecuting attorney and the justice of the peace then and there agreed that the said prosecution should be dismissed, and that the prosecuting witness, Edward Iverson, should pay all costs. The costs were accordingly taxed against the said Edward Iverson, and execution issued therefor. It was to retax the costs that this proceeding was commenced. The district court affirmed the action of the justice.

The statute provides the manner in which the judgments of a justice may be reversed and affirmed, and we are satisfied that the proceedings instituted before the judge in this case did not give him jurisdiction of the case.

We are also satisfied that a justice, prosecuting witness and prosecuting attorney do not possess the power to compromise felonies. That the statute authorizes the taxation of costs in misdemeanors against the prosecuting witness, but not in felonies, but in this case the prosecuting witness agreed to pay the costs. That there was an erroneous and

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illegal taxation of costs. We have no doubt that a court of equity, on the institution of proper proceedings, would give the plaintiff in error such relief as his case may merit, or if there is a collection of improper costs, that there may be a recovery had in a court of law.

All proceedings in this case dismissed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
MARCH TERM, 1876.

BATH *v.* INGERSOLL.

REPLEVIN.—Where the plaintiff in a suit in replevin failed to prove on trial the material allegations of his petition, and the court, on motion of defendant, ordered a nonsuit: *Held*, that the granting of such order was not erroneous.

IDEM.—The defendant in an action in replevin, having obtained against the plaintiff an order of nonsuit, may proceed to impanel a new jury in the same cause, and to assess the defendant's damages.

ERROR to the District Court for Albany County.

The plaintiff in error brought an action in replevin in the district court for Albany county to recover possession of a wagon, harness, and other personal property. The cause came on for trial at the Albany county August term of the district court, before Chief Justice Fisher and a jury for trial. After the plaintiff rested his case, certain evidence having been offered by him being excluded by the court, the defendant moved for a nonsuit. The motion was granted. The jury were discharged, a new jury was impaneled, the plaintiff was excluded from offering any further evidence and from cross-examining the defendant's

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witnesses, and the jury, after being instructed by the court, brought in a verdict for the defendant and against the plaintiff for the amount of the value of said personal property set forth in the petition, to all of which rulings and acts of said district court said plaintiff, by his counsel, duly excepted.

J. W. Kingman, for plaintiff in error:

I. The action of replevin, under our code, is an action to try the title to personal property, and consequently both parties are plaintiffs and each in turn defendants. Either party may recover the entire property, or each may recover a part of it. Each party must recover on some title shown to be in himself, not on the want of a title in his opponent: See Code, title Replevin; 2 Par. on Con. 477.

II. There was evidence tending to show title in the plaintiff, which should have been given to the jury; and it was error to order a nonsuit: 14 Wis. 553; 6 Pick. 117; 13 Wis. 175; 17 Mass. 249.

III. It was error to discharge the first jury, and also error to impanel a new one. The plaintiff was deprived of his right of challenge.

IV. It was error to deprive the plaintiff of the right to cross-examine defendant's witnesses: 26 Ill. 298; 8 Flor. 446; 7 Clark, 478; 1 Head (Tenn), 520; 5 Clark (Iowa), 463, 5 Fost. (N. H.) 229; 2 Par. on Cont. 479. Although the plaintiff is nonsuited in an action of replevin, he may still offer testimony to prove ownership of the property in himself, upon inquiry into the right of the defendant's possession: 1 Green. (Iowa) 13; 7 Blackf. 298. "On an inquest of damages, the defendant, after having defaulted, may cross-examine plaintiff's witnesses, introduce evidence in mitigation of damages, and address the jury." 8 Flor. 446.

V. It was error to refuse plaintiff the right to offer evidence on the question of damages: See authorities above cited.

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VI. It was error to prevent him from addressing the jury: Sney's Code, sec. 184, and notes.

M. C. Brown, for defendant in error.

This cause comes into this court on petition in error from district court, second judicial district. The plaintiff in error was plaintiff in court below. Action, replevin. After the plaintiff had submitted his evidence, the defendant moved the court for nonsuit, which said motion was sustained, and judgment of nonsuit ordered by the court, whereupon a jury was impaneled to assess damages for defendant, and a judgment entered upon their verdict in favor of the defendant. To reverse this judgment, this case is brought here on error.

The chief error complained of by plaintiff is this, to wit: that the court below had no right to grant nonsuit in an action in replevin, and that the proceedings of the court in so granting nonsuit, impaneling jury to assess damages, etc., were irregular and not warranted by law. An action in replevin is a common law action, and like every other action at common law, judgment by nonsuit is proper. That under the code, the proceedings in replevin, where nonsuit is adjudged by the court, must be the same as where there is judgment for the defendant on demurrer, or the plaintiff otherwise fail in the action: See Code, 1873, sec. 179, p. 54. That there was no error by the court in granting nonsuit (if the evidence was such as to warrant a judgment of this character in any common law case), and impaneling jury to assess damages: see 2 Ohio, *Reed v. Carpenter*; 2 Ohio, 87.

The next question of importance to be determined here is this, to wit: If judgments of nonsuit in actions of replevin are lawful, was the evidence offered in his case of such a character as to warrant judgment of nonsuit. We believe a motion for nonsuit to be in the nature of a demurrer to the evidence offered by the plaintiff. That the motion

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admits every matter as proved that the evidence has a tendency to establish, and that a nonsuit can only be granted when there has been an entire failure of evidence on some material allegation indispensable to the right of action: 11 Wheaton, 320.

We accept this theory of the law as most favorable to the plaintiff in error, and because it is supported by authority: See *Ells & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 644; 17 Ohio, 40-43, 1 McLean, 309; 3 Barn. & Cress. 462.

On motion of nonsuit the court will consider the whole testimony of plaintiff, whether given on cross-examination or in chief: 30 Maine, 117.

There is absolutely no evidence, as shown by the record, having a tendency even to establish the allegations of plaintiff's petition, therefore no error by court in sustaining motion for nonsuit. We have referred to all the errors complained of that we believe worthy of comment. We believe the judgment of the court below should be affirmed, and the defendant be allowed the highest percentage permitted by law as damages and costs in appeal.

By the Court, THOMAS, J.: There are several grounds of error alleged in plaintiff's petition in error. The court below certainly acted properly in excluding certain evidence of Dawson and another, for it would have been at best hearsay, and nothing but hearsay, evidence. The district court is sustained by excellent authorities upon the question, that in an action of replevin a motion of nonsuit may properly be granted, while in this instance, as the plaintiff's evidence not only failed to show title in the plaintiff, but also proved that the plaintiff had, some months prior to the commencement of the action in the district court, parted with all title thereto. We can therefore discover no error in the granting of the motion for a nonsuit.

The question of inpaneling another jury is something of a novel one. To us it seems that it is fully sustained by

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the provisions of our code, and that it is a much better practice than the one of having the damages assessed by the jury first impaneled, they having heard all the evidence for the plaintiff, and liable to be at least slightly biased by the same, while they would have no right to consider nor regard any portion thereof. While there may be a difference of opinion among the members of this court as to the right of the plaintiff, after sustaining a nonsuit, to appear and offer evidence or cross-examine witnesses upon the assessment of damages, it is apparent, from an examination of the whole record in this case, that no injury or injustice can have been done the plaintiff as our replevin law now stands. Under the general rule, therefore, there could be no reason for reversing this judgment upon that ground, even had the district court erred in refusing to allow the plaintiff to appear at the assessment of damages.

Judgment affirmed, and *writ of procedendo* ordered to Albany county.

ALSOP v. HUTTON.

EVIDENCE.—Although, upon a trial of a cause, immaterial evidence is admitted to the jury, the court of errors will not reverse the judgment, unless it clearly appears that the opposite party has been prejudiced or injured thereby.

INSTRUCTIONS TO JURY.—While the district court may have erred in refusing to give to the jury a certain instruction requested by defendant, as to the form of their verdict, if they found for the defendant in an action for replevin, yet if the jury find for the plaintiff, the defendant cannot be injured by the refusal of the court to give such instruction, and the judgment should not be interfered with.

ERROR to the District Court of Albany County.

This was an action in replevin, brought in the district court of Albany county, to the February term, A. D. 1875,

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by Charles H. Hutton *v.* Thomas Alsop and George Alsop, for the recovery of a certain lot of fencing poles, posts and wires for the construction of a fence; that one of the employees of Thomas Alsop tore down the said fence and hauled the poles, posts, etc., to the premises occupied by George Alsop; that upon the poles, posts, etc., being so hauled away, Mr. Hutton commenced his action in the district court against both the Alsops, and a writ of replevin was placed in the hands of the sheriff of Albany county, and he served the said writ and took possession of the property described in the writ. The case was tried in the district court, and the jury found for the plaintiff in that court, and assessed his damages at twenty-five dollars against George Alsop, one of the defendants, and found that Thomas Alsop was not a party to the action. The defendant, in the district court, reserved exceptions to the admission of certain evidence, only claiming, however, that the evidence offered and objected to was irrelevant and immaterial, and not that it prejudiced the rights of defendants. The principal exceptions, and those mostly relied upon, were to the instructions of the court on behalf, and others refused as asked for, on the part of the defendants.

M. C. Brown, for the plaintiff in error.

This case is brought here by petition in error from the district court of the second judicial district of Albany county. The action in court below was replevin, brought by Charles H. Hutton, defendant in error, against Thomas Alsop and George Alsop, to recover the possession of a certain lot of fencing alleged to be in the said defendants' possession and wrongfully detained by these said defendants. The answer denies all the allegations of the petition, sets up property in a third party, to wit: McIntosh, and claims damages for loss of time, etc., for defending suit and for attorney's fees. Verdict was returned by the jury on issue joined against George Alsop for twenty-five dollars. Motion

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to set aside said verdict was refused by the court below, and judgment ordered by the court on the said verdict and for costs of suit. To reverse this judgment against George Alsop this action is brought here.

The plaintiff in error to recover this judgment will rely chiefly on this point, to wit: That the court below erred in refusing to set aside the verdict and grant a new trial of this action, because the verdict is contrary to the law as given by the court in its instruction, and against the weight of evidence in the case. It is admitted that a court will not disturb the verdict of a jury, unless the jury have manifestly returned the verdict against the instructions of the court and against the weight of evidence in the case; but if the verdict is so against the evidence, and the law as given by the court, it is the simple duty of the court to set it aside, and it is error if the court fails so to do, and the judgment should be reversed. The record evidence shows: Three witnesses swear that George Alsop, plaintiff in error, was not in possession of the property, and there was no right of action against him, and no one swears that he was in possession or connects him with unlawful detention of property in question.

There is no evidence showing demand on either of the Alsops for property before suit, and no wrongful taking, therefore no action could be maintained against either of the Alsops.

J. W. Kingman, for the defendant in error.

By the Court, FISHER, C. J.: The record in this case does not show, nor indeed is it alleged, that the ruling of the court in permitting the evidence complained of to go to the jury, in any way operated to the injury of the defendants in this action, and all that can be said against the action of the court in this respect, is that immaterial evidence was admitted. And by the one hundred and thirty-fourth section of the civil code of this territory, it is provided, that

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“The court in every stage of action must disregard any error or defect in the pleading or proceedings, which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.”

So that we fail to see how the aid of this court can be invoked to cure the defect complained of. The exceptions to the instructions asked for on the part of the plaintiff, and given we think, presents no error that calls for our interference. And those which the court refused to give as asked for on the part of defendants, although not given as asked for, are substantially given by the court in its instructions to the jury at the close of the argument; so that everything asked for is given except one in which the court was asked to instruct the jury to find attorney fees for defendants if they should obtain a verdict. It is true that section 180 of the code of 1873 allows and requires defendants' attorney fee when the jury finds for defendant, either that he had at the time of the commencement of the action the right of property or the right of possession; and while we do not clearly see why the court below refused to give this instruction, yet, inasmuch as the jury found for the plaintiff, we cannot see that the defendant has any cause to complain of the court in refusing to give the instruction.

We therefore find nothing in the record of which the defendant has any legal grounds of complaint, the whole matter having been fairly committed to the jury who found under the facts as given to them.

The judgment is affirmed.

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JENKINS v. THE CITY OF CHEYENNE.

CIVIL ACTION.—Under the code of procedure of Wyoming territory, an action in which the city of Cheyenne, a municipal corporation, prosecutes as plaintiff to recover a fine or penalty, under the ordinances of the city, is a “civil action.”

PRACTICE—APPEAL FROM JUSTICES’ COURTS.—In taking an appeal from the judgment of a court of a justice of the peace, the requirements of the statute must be strictly and literally complied with as to the affidavit and undertaking by the appellant, or his appeal will on motion be stricken from the docket of the appellate court.

ERROR to the District Court for Laramie County.

This was an action originally commenced upon information before Thomas M. Fisher, a justice of the peace in and for Laramie county, charging defendant (now plaintiff in error), with keeping a certain bawdy-house, etc. The record shows that a jury trial was had, under the provisions of the law allowing jury trials before justices of the peace, and that the said defendant was adjudged guilty, and the penalty of one hundred dollars affixed against her. That the defendant gave notice of an appeal. That an appeal was taken, but not entered, on or before the second day of the next term of the district court. On the fourteenth of December, the counsel for the city of Cheyenne, Mr. Street, moved the court to dismiss the appeal, for the reason of defects therein apparent, which motion, after argument, was overruled, under the provisions of the statute, which give the appellant power to correct defects in appeals at any time before the case is called for argument or trial. The city attorney also moved to have the case changed from the criminal to the civil docket, which motion was sustained.

On the twenty-second of December, a motion was filed by Mr. Street, attorney for plaintiff, to dismiss the appeal, because no proper bond was filed nor affidavit made, as required by the surety in the bond as provided by the statute. On the twenty-seventh of December, this motion was sus-

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tained and the appeal was dismissed, and the case remanded to the justice of the peace for further proceedings upon the said case. A petition in error was then filed, and the case duly brought into this court for review, and the following errors assigned:

1. Because the court erred in sustaining the motion of the city of Cheyenne (now defendant) to transfer said cause from the criminal to the civil docket, and ordering the same to be entered on said docket, and set down for trial therein.

2. Because the court erred in sustaining the motion of the said defendant to strike off and dismiss the appeal of the plaintiff, previously taken from a justice's court to the said district court of the first judicial district of Wyoming, on the ground and for the reason that no sufficient undertaking in appeal had been made and filed, that the surety named in the said undertaking had not made affidavit to the same as required by law, and for the reason that the appeal in said case taken was not taken and perfected in the manner prescribed by law for civil cases.

3. Because the court erred in making the final order, and rendering judgment in the said cause that the appeal in the cause, taken by plaintiff, be dismissed, and remanded by *procedendo* to the justice's court for further proceedings therein.

E. P. Johnson and W. P. Carroll, for plaintiff in error.

This case comes up from the first district, and the facts are that plaintiff was complained of before Justice Fisher as police magistrate of the city of Cheyenne for violating a city ordinance "concerning offences in the nature of misdemeanors," etc. Whereupon she was arrested, tried, and convicted, and thereafter appealed to the district court in accordance with the statutes governing appeals in criminal cases. A motion was made to dismiss the appeal by the appellee, but it was denied. The court then transferred the case to the civil docket, after which another motion to

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dismiss the appeal was made, for the reason that the bond required on appeal in civil cases was not sufficient, and the practice in civil cases had not been complied with. The motion was sustained and the case dismissed. Plaintiff in error alleges that there was error in said ruling:

I. Because the action was criminal and not a civil action, and the defendant in the case proceeded properly in her appeal from the justice under the code relating to criminal practice in the justice courts: Bishop on Stat. Crimes, secs. 403-7; Dillon on Mun. Corp. secs. 301-2, 343-5, 357-69, inclusive; 42 Pa. St. 89-94; 16 Pick. 504; 17 Wisc. 26. It will be seen that the seeming conflict of authorities upon the question has referred to questions of constitutional law in the states, and involves only the meaning of the constitutional and statutory provisions concerning trials by jury. They are not in point, *pro* nor *con*, in the determination of the question as to whether the appeal from the justice should have been dismissed. The case is treated from a criminal standpoint by both statute and ordinance, and by the municipal court. The appeal was allowed in conformity with the criminal practice: Laws of 1869, p. 132, sec. 114; Id. 699, subd. 16; Id. 704, sec. 33; Laws of 1871, p. 73, sec. 35.

The city having invoked the criminal jurisdiction of the justice court, it should not have been heard to question its procedure to the prejudice of the defendant in the district court on principle. And the action of the court was in clear violation of law to the prejudice of the plaintiff in error: Laws of 1871, p. 74, sec. 40.

II. Changing the case from the criminal to the civil docket was in itself immaterial, as it could not change the rights of parties. Upon the transfer the record shows an attempt on the part of plaintiff in error to file the affidavit and bond as an appeal in civil cases to conform to the judgment of the court, and the law was substantially complied with in that respect, except that the affidavit required by sureties to the undertaking was not made: Laws of 1871, p.

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67, sec. 203. And for that reason the appeal was finally dismissed. While it is submitted as error to have the case so treated by the court, it is also submitted that the undertaking is not vitiated by the failure to justify for while the officer taking it may be responsible for the failure to demand it, it does not by any construction or consideration relieve the surety of liability.

Thomas J. Street, for defendant in error.

In addition to the authorities presented by the brief of the plaintiff concerning the character of the proceeding, and whether the same is civil or criminal, I desire to refer to an ordinance passed by the city of Cheyenne, July 17, 1874, a certified copy of which is herewith furnished for the use of the court. Under a law passed at the last session of the legislature it is provided that all the courts of this territory shall take judicial notice of all ordinances passed by said city of Cheyenne upon the presentation thereof attested by the clerk, and certified to have been passed and published according to law.

By the Court, FISHER, C. J.: The first error complained of was the transferring this cause from the criminal to the civil docket. We do not see how the rights of the plaintiff in error could be seriously invaded by the order of the district court in changing the case from the criminal docket, and where no injury results from the action of the court, errors are to be overlooked. But apart from this there was no error, as will be fully seen by reference to the eighth and ninth sections of chapter 75 of the laws of 1869, and are as follows: "Sec. 8. A criminal action is one presecuted by the territory as a party against a person charged with a public offense, for the punishment thereof." Sec. 9. "Every other is a civil action." This, to a reasonable mind, is enough, but we may go a little further, and say that the mode usually resorted to for the recovery of penalties for

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the violation of municipal ordinances is by civil actions. There are many both common law and statutory offenses which are *quasi* criminal actions, and which incur criminal consequences, which are nevertheless to be proceeded in as civil actions.

The second error complained of is the striking off of the appeal or rather dismissing the appeal on the ground of the insufficiency of the undertaking. A simple reference to the requirements of section 67 of the justice code of 1871 which requires an undertaking that the appellant will prosecute his (or her) appeal to effect. That if judgment is rendered against him (or her) on the appeal, or his (or her) appeal be dismissed, he will satisfy the judgment and costs; that the appeal has not been taken for delay, but that it is taken in good faith, believing that injustice has been done, etc.; and it is required that the surety must be a resident of the county and a property holder. All this should appear affirmatively. And by another provision it is required that the surety must make an affidavit to his sufficiency. This record fails to show that any of these requirements were complied with, consequently no such proceedings were had as would justify the court in overruling the motion to dismiss the appeal.

The third error assigned is so involved in what has already been said, that we do not deem it necessary to pass upon it.

The proceedings of the district court are affirmed.

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BOARD OF COMMISSIONERS OF ALBANY
COUNTY *v.* N. K. BOSWELL.

SHERIFFS' FEES.—Under the laws of Wyoming for 1869 the allowance to the sheriffs of the respective counties, of one dollar per day for the custody and subsistence of prisoners, is one of the perquisites of the office, as well as a remuneration for services rendered and articles furnished, and county commissioners have no power to deprive a sheriff of the same.

ERROR to the District Court for Albany County.

This was an action brought from Albany county, second judicial district, at August term of said court, A. D. 1873.

The record shows that M. K. Boswell commenced his action in the court below for the recovery of two thousand seven hundred and twenty-two dollars, alleged to be due him as sheriff and keeper of prisoners in the Albany county jail during parts of the years 1869, 1870 and 1871, amounting in the aggregate as above stated, with a credit on said account in the sum of one thousand and forty-one dollars and fifty-six cents, leaving a balance due said plaintiff in the sum of one thousand six hundred and eighty dollars and forty-four cents, with interest up to the date of the trial and judgment. The plaintiff, Boswell, filed his petition in the district court, to which the board of county commissioners filed a general demurrer, which was overruled, to which ruling they reserved their exception. The defendants then filed their answer, denying the whole indebtedness, and setting up specially that they, the said board of commissioners, had entered into a contract with the military authorities at Fort Sanders for the keeping and subsisting of the prisoners.

The plaintiff moved the court to strike from defendants' answer said special matter, which motion was sustained, and defendants excepted. The case was tried and went to the jury under the charge of the court, in which charge the court directed the jury that, under the laws of Wyoming, the sheriff was the proper custodian of the prisoners committed

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to the jail of the several counties of the territory, for the keeping of which that officer was entitled to receive from the county funds the sum of one dollar per day for their keeping, and that the county commissioners had no right to do anything by which he was prevented from recovering that amount.

The defendants in the court below claimed that they had made a contract with the military authorities at Fort Sanders for the keeping and subsistence of the prisoners, and that, therefore, the plaintiff had no claim against them for said keeping and subsistence, and cited several authorities in support of their position, none of which, however, we think, are applicable to this case. Under the evidence, and the instructions of the court, the jury found for plaintiff below, and assessed his damages at two thousand four hundred and fifty-four dollars and twelve cents, and judgment was entered for plaintiff for that amount.

C. W. Bramel, for plaintiff in error.

This case was originally commenced in the court below by N. K. Boswell, to recover of the county a large sum of money alleged to be due him for keeping or boarding prisoners of the county while he was sheriff. The petition was demurred to on the ground that the plaintiff should present his bill first to the county commissioners, and appeal from their decision in case of disallowance. On that question the cause came up to this court at its last term. The action was sustained and the case went back for further proceedings, when the defense set up was that there was no jail; that the prisoners were kept at the military post of Fort Sanders, by an arrangement with the county commissioners; and that the county subsequently paid the military authorities at the post in full for keeping the prisoners. The right of the sheriff to make contract with other parties for keeping prisoners was also denied.

Upon the joining of issue, the court struck out all that

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portion of the answer setting up a contract or arrangement between the county commissioners and the military authorities. A trial resulted under the rulings of the court on the admissibility of testimony, and as to the law in the instructions to the jury, which judgment, it is submitted, is based on error in the following particulars:

I. The court erred in sustaining the motion of Boswell to strike from the answer the second defense set up. That portion of the answer, if maintained by plaintiff, constitutes a complete defense.

It is said there was no county jail. If so, it was not only the proper province of the commissioners to provide for the keeping of the prisoners, but their duty so to do. The entire management of the affairs, interests and business of the county is in their hands: Laws of 1868, p. 149, sec. 11; 48 Penn. St. Rep. 123; *Vankirk v. Clark*, 16 Sergeant & Rawle, 290; *Selauble v. The Sheriff*, 10 Harris, 19. The commissioners must provide or designate a county jail: Laws of 1869, p. 293, sec. 1. It is the duty of the sheriff to keep such jail after it has been provided: Laws of 1869, chap. 17, sec. 4, p. 162. And in case the sheriff boards the prisoners, he is allowed as compensation one dollar per day: Laws of 1869, p. 375, sec. 2. But there is no law compelling him to board prisoners or even making it his duty so to do. The motion stated as one ground that the new matter did not constitute a set-off or counter-claim. But it is not necessary that it should if it constitutes a defense: Laws of 1873, p. 39, sec. 90; Nash, Pl. and Pr. 185.

II. The court erred in overruling the objections of defendant to the testimony of plaintiff below, as to the making a contract by him with the military authorities. The objection was good, the object being to bind the county by a contract, which, if made, was beyond his power to make. The law vests in the sheriff nowhere the power to provide or designate a jail. Again, the action was not by third parties to recover against the county, but by an officer to recover on a contract implied by law, between himself and the county,

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hence the irrelevancy of all the testimony of the sheriff concerning an alleged contract between himself and some one else. Again, if the sheriff had no authority to contract in the name of the county with the military authorities, he could have no claim against the county by virtue of his own illegal action. So, too, the objection to the testimony of the plaintiff below, to the hearsay and secondary testimony as to the contracts of the guard-house registers, should have been sustained as the evidence was clearly incompetent. Several erroneous rulings by the court as to the admissibility of the evidence by Wagner were cured by the waiver of them by the counsel in whose favor they were made. But the sustaining of the objections of the plaintiff below to the testimony of Abbott, the effect of which was to deprive the defendants below of the testimony concerning their contracts or arrangements with the military authorities, was error, for the same reasons given and under the authorities cited under the first head of this brief. The exclusion of the county records was error for the same reason.

III. The court also erred in refusing to give the instructions requested by defendants below. The instructions were evidently refused on the same view of the case by the court, that caused it to sustain the motion to strike out the second defense in the answer, and is error for like reasons. The giving of the instructions contained in the record was error:

1. The second instruction given was erroneous, in that it did not go further. It should have been qualified by the words, "to the county jail." That no prisoner can be lawfully imprisoned, except as he is in the custody of the sheriff of the county, is absurd.

2. The third instruction is as completely in the face of the law as can well be imagined: See authorities before cited.

3. The fourth instruction was erroneous and calculated to mislead the jury, for the reason that it is not warranted by the evidence, or anything else that appears in the case. It is incorrect as an abstract proposition, even if it were applicable.

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4. The fifth instruction, as a proposition of law, is incorrect; as constructed, is inapplicable under all the testimony; has a tendency to degrade the office of sheriff, and make him a vulture preying on the necessities of the county, whose interests he is elected to subserve, and to encourage the sheriff in a betrayal of the trust reposed in him. It is therefore erroneous, having a direct tendency to mislead the jury.

5. The sixth instruction given, so far as it instructs the jury to find for the plaintiff, is the legitimate product of the errors which had preceded it, with the addition that it took from the jury the right to weigh the evidence and judge of the facts themselves. Where there is evidence *pro* and *con* upon any issue, it is error for the court to take the case from the jury: 3 Graham & Waterman on New Trials, 738 to 763 inclusive, and cases there cited. And in so far as it stated the fact to be, that the allegations of the petition were not denied, and were therefore confessed; it was a very plain statement in the teeth of a very ample denial of indebtedness, in manner and form as alleged. Again; not only is there a general denial in the portion of the answer that remained, but a full statement of matter, constituting a complete denial and defense in that portion stricken out; and an instruction based on previous error could hardly be relied on to cure the first, or be in itself correct, in consequence of its erroneous foundation.

IV. The motion for new trial should have been sustained on account of the errors heretofore mentioned, and the additional reason therein set forth, that the verdict is not supported by testimony. It is proven and conceded that during Boswell's administration there was no county jail. The evidence for the defense shows an arrangement with the military authorities, by a previous board of commissioners, which was continued in force by mutual consent. But it is important who made the contract. The testimony of Boswell is that he made a contract to have the prisoners kept at thirty-three and one third cents per day; that he did not board them, or furnish them provisions; that the bill for their keep-

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ing under that contract was paid by the county. Under that testimony he should either have been nonsuited, or the jury should have been instructed to find for the defendant. Again; Boswell could not swear to his account, and did not. His testimony furnishes no basis upon which the jury could possibly have assessed damages in his favor, or upon which the court could have instructed them so to do. The evidence did not support the verdict.

V. The overruling the demurrer was also error, as the petition certainly showed upon its face that there was no cause for action, for the reasons stated in the demurrer. But it was done under the direction of this court, and the opinion of this court on that point will probably be considered the law in this case, and render further argument here nugatory. It is assigned as error, however, to save the point, should the case be reviewed by a higher court.

M. C. Brown, for defendant in error:

The first objection made by plaintiff in error to the proceedings in this case is the ruling of the court in striking out, on motion of defendant in error (plaintiff in court below), a portion of the answer, on the ground that it was redundant, irrelevant and scandalous. The answer filed was wholly bad, for the reason a general denial would have put in issue every fact to be tried in the case. The answer was a special denial, and therefore bad for redundancy: See Nash's Pl. and Pr. 64, 65; 6 Pr. R. 355; Van Santvoord's Pl. 251; *Dennison v. Dennison*, 9 Pr. R., 246.

There was no error by the court in striking out on motion the last part of the answer for redundancy, because this part of the answer is specific and takes issue on an immaterial matter: Nash, 65; Van Santvoord's Pl. 251.

There was no error by the court in striking out, for another reason. There could be no fact proven under this part of the answer, if allowed to stand, that could not be put in evidence under the special denial preceding it: Nash, 66 *et seq.*

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New matter in avoidance cannot be pleaded under the code without admitting a cause of action in the plaintiff, and then pleading special matter showing no right to recover at the commencement of the action: *Nash*, 67 *et seq.*; *Kyving v. Bull*, 16 N. Y. 297.

There could be no error avoidable to the defendant, unless he suffered by reason of the ruling of the court. No evidence was excluded, and therefore there was no wrong: See 10 Ohio St. 557; 6 Id. 288; 9 Id. 1-6.

From the authorities aforesaid, we claim that there was not only no error by the court in striking out, but the plaintiff might, considering the whole answer, have properly asked for judgment for his entire claim without any evidence being offered. Was there sufficient on which the jury might base the verdict returned? Clearly there was. The court cannot set aside a verdict because the evidence is conflicting: see 17 Ohio, 128, 131; 12 Ohio St. 515; 6 Ohio, 456; 12 Id. 151. The court can only set aside verdict when it is clearly against the evidence: See *Webb v. Protection Ins. Co.*, 6 Ohio, 456; 12 Id. 151; *Nancy v. Sackett*, 1 Ohio St. 55; 3 Id. 399; 4 Id. 556.

It is urged as error in the court that instructions requested by plaintiff in error were refused. This was not error in the court, because the instructions were not presented at the time required by law. Some of instructions not sound law, therefore no error: *Inghbright v. Hammond*, 19 Ohio, 337.

No request for instructions was made, as by law required: See Code, 72, subd. 5, sec. 226. The giving of requested instructions then became a matter of discretion, therefore a failure to give them cannot be error: *Legg v. Drake*, 1 Ohio St. 286; 11 Id. 114-118, 339-347, 691. To request instructions is to gain a technical advantage, and should be met with technical objections: *Forksythe v. State*, 6 Ohio, 19-21.

The plaintiff in error alleges error by the court in giving certain instructions at the instance of defendant in error.

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The objection goes to all the instructions generally, and not to any certain instruction, and is therefore bad, even if the record shows error. The exception goes generally to all the instructions given, if one only of the instructions is correct in law the exception is not well taken, and the judgment below cannot be disturbed: See *Cleveland Co. C. R. Co. v. Terry*, 8 Ohio St. 570; 19 Ohio, 337; *Frances v. Millard*, 2 Ohio St. 44; 14 Id. 292; 2 Id. 598. When from the whole record it appears conclusively that a proper judgment was entered it cannot be reversed on error: *Harmon v. Kelly*, 14 Ohio, 502; 14 Id. 606; 8 Ohio St. 405; 10 Id. 557. But the instructions given are sound law, and there is no error by the court if the exception is well taken.

First instruction given, that it is sound law, needs no comment.

The second instruction is also sound: See Stat. 1869, p. 293 *et seq.*, secs. 3, 4, 6, 10, 11, 12; see also same Stat., pp. 162 and 3, secs. 4, 5 and 6. What is good law needs no comment. The duties of county commissioners: see Stat. 1869, p. 146 *et seq.* That they have no implied powers or authority has been before decided in this court. Instruction numbered 4 is sound beyond a possible question, and needs no comment. Instruction numbered 5 is sound law. It is simply a reiteration of the statute of 1869, page 375, sec. 2, of act fixing fees of officers. The instruction numbered 6 was the last given. It accords with the first instruction given, and is sound law. It is in strict accord with our statute of 1873, page 44, sec. 124. There being no error claimed or properly presented on the admission of evidence, and the other objections being before disposed of, we say there is no error in the record, and the judgment of the court below should be affirmed.

By the Court, FISHER, C. J.: We find no error in the instructions of the court. The laws of Wyoming allow the sheriffs of the respective counties one dollar per day

Statement of Facts.

for the custody and subsistence of each prisoner; and while it is the duty of the county commissioners to provide a proper jail or place of confinement for prisoners, they are not empowered to make any arrangement by which the emolument of the sheriff will be affected. The commissioners in this case claim that they paid to the military authorities at Fort Sanders thirty-three and one-third cents per day for keeping the prisoners during the times stated. We find that the plaintiff in this action below gave them full credit for that amount, so that they have no cause to complain, because when the judgment in this case shall have been paid, they will only have paid the amount which the law requires them to pay, except the amount of interest to which they have become liable in consequence of their delay.

The judgment is affirmed.

TRABING *v.* BOARD OF COMMISSIONERS OF ALBANY COUNTY.

SURETIES.—Though at common law the discharge of one surety to a bond or undertaking may discharge all, a court of chancery may interfere, and see that material justice is meted out to all parties.

APPEAL from the District Court for Albany County.

This was an action in chancery brought from the second judicial district to March term of this court, 1876. The record shows that on the twenty-third day of July, A. D. 1869, the appellant, with one J. H. Finfrock, became sureties for one Samuel Douglass, who had been indicted by the grand jury of the offense of assault and battery, with intent to kill and murder. The bond aforesaid being in the penal sum of one thousand dollars, suit was brought on the said bond in the district court in and for Albany county, at the September term, A. D. 1870.

Argument for Appellant.

On the third day of July, A. D. 1872, the board of county commissioners, at a regular meeting held at the commissioners' office at Laramie city, in said county of Albany, made an arrangement by which the said J. H. Finfrook was, on the payment of two hundred and fifty dollars, released from all further payment or liability on account of said bond or judgment, the bond having become merged in the judgment.

On the ninth day of July, A. D. 1875, an execution was issued out of the district court, directing the sheriff of Carbon county to levy on the personal property of A. Trabling to satisfy the said judgment, interest and costs. The sheriff proceeded to levy on certain cattle and other property belonging to defendant Trabling and others, and advertised the property for sale. Trabling, on the thirty-first of July, 1875, filed his bill in equity, and prayed for a restraining order to stop the sheriff, commissioners, etc., from proceeding further, which order was granted by the judge of the second judicial district; but after several hearings on the said bill at the September term of the court in and for Albany county, on the eighteenth day of October, A. D. 1875, the plaintiff's (Trabling) bill was dismissed. It should be stated that prior to the hearing of said bill a stipulation was entered into by the counsel for the plaintiff on his side, and the county attorney for Albany county agreeing to a certain statement of the facts, upon which the whole case was submitted to the district court in the nature of a case stated.

The plaintiff appealed from the decision of the court below, and brings the record here for review, and assigns for error the ruling of the court on the facts as set out in the stipulation of the parties, claiming that the action of the county commissioners in releasing Finfrook from all further liability without the consent of Trabling, released and exonerated Trabling from any further payment on the judgment.

J. Street, for appellant, cited 1 Story's Eq. Jur. sec. 112; 1 Pars. on Con. 27; *Milligan v. Brown*, 1 Rawle, 391.

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C. W. Bramel, for appellant, cited 17 Cal. 239 ; *C. Johnson*, C. R. 242 *et seq.* ; *Ruggles v. Patten*, 8 Mass. 479 ; 7 Johns. 207 ; 12 Wright Pa. R. 168.

By the Court, FISHER, C. J.: We think the court below erred in dismissing plaintiff's bill. The laws of Wyoming invest the court with very extended powers in chancery cases. The chancellor is invested with the power to grant the prayer of the bill, to dismiss the bill, or to grant such relief as shall be in accordance with justice and good conscience. Now, Finrock being released from all liability on account of the bond or judgment obtained thereon, leaves Trabling liable for the whole amount. And by the dismissal of his bill he becomes liable to pay the judgment, interest and cost, and at the same time deprived of the privilege of proceeding against Finrock for contribution. Surely this cannot be explained upon any equitable hypothesis. We therefore think the proper order would have been to modify the claim as provided for in section 511 of the code of 1873, and that unless the plaintiff in the judgment on the bond would accept of such modified order, that then the injunction should have been granted as prayed for.

This court therefore order and decree that upon the plaintiff in this action paying to the board of county commissioners of Albany county the sum of two hundred and fifty dollars, with interest from the date of the release given to Finrock and the costs, that the said board shall execute a full release and satisfaction, and that upon their failure to comply with this order, that then the injunction be made perpetual. This action is based upon the provisions of sections 512 and 513 of the statutes of Wyoming, 1873, which invests this court with the power to reverse, vacate or modify any judgment rendered or final order made by the district court or any judge thereof.

Argument for Plaintiff in Error.

EMERY ET AL. v. HAWLEY.

NEW TRIAL.—A motion for a new trial will not be granted where two verdicts for the same party have already been rendered, the second for a larger amount than the first, where the amount involved is small, and where there is no probability that a verdict materially different would be arrived at by a jury, unless very great and manifest injustice has been done.

ERROR to the First Judicial District Court for Laramie County.

A sufficient statement of the case appears in the opinion of the court and briefs of counsel.

E. P. Johnson and W. P. Carroll, for plaintiff in error.

This case comes up from the first district. Plaintiffs in error were defendants below. This action was one in replevin for the recovery of a horse, and the case was tried at the May term, 1875. No exception was taken to the instructions of the court to the jury, but a motion for a new trial was made and filed by the plaintiffs in error, on the ground that the evidence did not support the verdict, which was in favor of Hawley for ten dollars damages, and against both of the defendants. The motion was overruled, and an exception taken, and a motion in arrest filed, the ground being a defective verdict, upon which no judgment could be rendered, which motion was also overruled, and the verdict amended by the court several days after its rendition, so that judgment could be rendered on the same; to all which exception was taken, and it is to correct those errors that the case is brought up.

I. The first error complained is that the motion for a new trial was overruled. It will be seen by the testimony that there was no proof of damage, and yet the jury assessed the damage at ten dollars. In that respect the motion was well founded, and should have been sustained; Second. No

Argument for Plaintiff in Error.

verdict could be against both of the defendants. The gist of the action of replevin, under our statute, is the wrongful detention of personal property. The action can only be maintained against one who has in fact or in law the control or possession of the property. The plaintiff must not only show that he is lawfully entitled to the property, but that the defendant unlawfully withholds it: Nash Pl. & Pr. 812; *Bank v. Dayton*, Sup. Ct. Wyo. The very ground upon which plaintiff below based her right to recover was that no title has ever passed to A. S. Emery, and that there had never been a delivery to him. If so, it is simply a legal impossibility that A. S. Emery should have wrongfully detained the horse, yet the verdict and judgment were against him as well as against George. Plaintiff's own testimony shows that no demand was ever made on A. S. Emery.

On the other hand, if A. S. Emery did own a part of the horse, or if possession was given George by both Hawley and A. S. Emery, then George was not only justified in refusing to deliver to either without the order or consent of the other, but he would have been liable to the injured party had he done so, and the action cannot be supported by one joint owner of property. The very ground upon which recovery could be had against either would be a complete defense for the other. The verdict is contrary to all the evidence and the law. There is nothing to support it against both defendants.

II. The motion in arrest should have been sustained. The judgment must conform to the verdict: Laws of Wyoming, 1873, 94. No judgment could therefore have been entered on the verdict in this case, as the verdict was not entitled in the cause, but purported to be a verdict in some other cause in which neither plaintiff nor defendants were the same. The verdict is unintelligible. There was no evidence to support the assessment of damages against the defendants. There was no evidence to justify a judgment or verdict against both, if that is what is meant. The court

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below, while overruling the motion in arrest, admitted by implication that it was well taken in amending the verdict to make it responsive to the issue before rendering judgment, and thereby annulling the third error complained of, to wit, amendment of the verdict several days after the discharge of the jury, and upon its own motion.

Judgment must be in conformity with the verdict of the jury if a jury trial be had, and not the verdict of the court. The amended verdict was not the verdict of the jury, and the judgment thereon was erroneous and void. Again, it was error to amend the verdict of the jury without their consent prior to their discharge, in any material point: *Clark v. Irwin*, 9 Ohio, 131; *Patterson v. United States*, 2 Wheat. 221; *Sergeant v. State*, 11 Ohio, 472; *Blackley v. Shetton*, 7 Johnson, 32. That the amendment was material is shown in the necessity for a different verdict in the case, before judgment could be pronounced.

Thomas J. Sheel, for defendant in error.

This cause has been twice heard by jury, both verdicts for Hawley. The court refused to disturb the second verdict. No exception was taken to the charge of the court to the jury or to any act of the court, except the correction of the form of the verdict.

I. A third trial will rarely be granted, after the concurring verdict, unless some plain rule of evidence or principle of law be violated: 2 Tibb's Practice, note to p. 904 *et seq.* It seems from the note to be a matter resting in discretion of judge below.

II. The court had a right to correct the verdict: Laws Wyoming, 1873, p. 45, secs. 133, 134.

By the Court, THOMAS, J.: This was an action of replevin in the district court, brought by the said *Hawley v. Geo. A. Emery and A. L. Emery*, to recover the possession of a certain horse of the alleged value of three hundred dollars.

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No complaint whatever is made by the plaintiff in error that any error whatever was committed by the judge of the district court upon the trial of the case, until the coming in of the verdict in favor of the then plaintiff, now defendant in error.

This case was twice tried in said district court before a jury, and in each instance a verdict was returned in favor of the plaintiff, and upon the second occasion for a much larger amount than upon the first. While the jury upon the second trial could have very materially improved the form of their verdict, we are not of the opinion that under the circumstances, the court below would have been justified in setting aside the same and ordering a third trial.

Neither do we perceive under the circumstances, that any error was committed by the district court affecting the rights of parties. And after two trials, upon each of which verdicts were rendered for the plaintiff, it would, we believe, require a very strong case to authorize the granting of another trial. The amount of damages for which the verdict is rendered is also very small. It may be said that that should not be taken into consideration by the court, as every person is entitled to his rights whether they relate to a large or a small sum. This is undoubtedly true to a very great extent, in fact in every case, until we reach the question of appeals. At that point it is apparent from the laws in reference to appeals to the supreme court of the United States and of this territory, that the amount involved is a most important question.

The judgment of the district court is affirmed, and a *writ of procedendo* ordered to Laramie county.

Argument for Defendant in Error.

UNION PACIFIC RAILROAD COMPANY *v.* WILSON.

REFEREE.—Under the provisions of the statutes of Wyoming, the court may order a reference in a case the trial of which involves the examination of a long account.

IDEM.—But where the report of a referee is not responsive to the issues, the case should be sent back for trial to a new referee, or to a jury, and not to the first referee.

ERROR to the Second District Court for Albany County.

A sufficient statement of the case is contained in the opinion of the court.

W. W. Corlett, for the plaintiff in error, contended that the report of the referee was irregular, uncertain, irresponsible to the issues, and unsupported by the evidence, and that the district court erred in referring the case back to the same referee and in ordering judgment upon the final report, and cited: 1 Abb. Prac. 187, 262; *Gregory v. Wright*, 11 Abbott, 417; *Allen v. Patterson*, 7 N. Y. 476; Nash, Pl. 10, 16; *Garcia v. Sheldon*, 3 Barb. 232; *Bank of Washington v. Triplett*, 7 Curt. 433; *City of Buffalo v. Holloway*, 7 N. Y. 493; Cooley's Const. Lim. 365; 2 Am. Rep. 100; 13 Id. 55; 5 Metcalf, 400; 29 Penn. St. 262; 11 Mann, 396; 35 Wis. 131; 7 Ohio, 2.

J. W. Kingman, for defendant in error.

This is an action of assumpsit, founded on a balance of account for work and labor and materials provided by the plaintiff for the defendant. On the application of the defendant, a copy of the plaintiff's ledger account was made a part of the petition. From that it appears that the plaintiff's charges amount to thirteen thousand three hundred and eighty-four dollars and fifty-one cents, and his credits amount to twelve thousand one hundred and forty-eight dollars and ninety-eight cents, leaving a balance due him, on the thirtieth day of August, 1870, of one thousand

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two hundred and thirty-five dollars and fifty-three cents. As the investigation of these large accounts would be laborious before a jury, the court ordered the case to a referee for a hearing. To this order the defendant made no objection and took no exception. The order was general, to wit, that the referee should "take the testimony in the case and report the same to the court, with his findings of fact thereon." The referee took all the testimony in writing, with all the exceptions and objections of the parties, and returned the same to the court, with a general finding in favor of plaintiff of one thousand one hundred and sixty-four dollars and twenty-three cents, with interest thereon from August 31, 1870, to date of judgment. The court confirmed this report, after a long and patient investigation, and ordered judgment thereon.

During the progress of the trial before the referee the defendant requested the referee to answer a long list of questions, or report a large number of special findings, which the referee has attempted to do; but we deny the right of the referee to dictate any such questions, and we insist that a general finding for one party or the other is all that the referee could do, under the order in this case.

He was directed to report the testimony in this case and his finding as a verdict thereon, and he had no power to decide questions of law or report his views of the law to the court: Stat. of 1873, sec. 283. The whole matter would then be open to a review on the law and the evidence, in the district court, and a proper judgment rendered. We insist, therefore, that the general finding in this case can only be assailed on the same grounds, and for the same reasons, that a general verdict of a jury could be assailed, and that the bill of exceptions contains no valid objections to a general verdict on the pleadings.

By the Court, FISHER, C. J.: This was an action founded on several causes of action, to wit:

1. For work and labor, care and diligence of said plain-

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tiff, now defendant in error, performed and bestowed about the business of said defendant, now plaintiff in error, at his request; as boarding-house keeper, and also for divers goods, wares and merchandise, and other necessary things, by said plaintiff found and provided, by said defendant's request.

2. Said plaintiff below claimed one thousand one hundred and twenty-five dollars, for wages or salary for services performed as clerk for defendant, now plaintiff in error. On the thirteenth of February, A. D. 1875, the defendant below filed his answer to plaintiff's petition, denying generally and specially the allegations of the said petition, and for a second defense plead payment in full, and for a third defense pleads the bar of the statutes of limitations. On the said thirteenth of February, 1875, by agreement of parties, A. G. Swain was appointed referee, to take and report his findings of facts to the court. On the nineteenth of March, 1875, the referee reported to the court the evidence taken, and his findings thereon, and the case came on to be heard on the defendant's (below) motion to set aside the report of the referee and grant a new trial. On the twenty-seventh of March, 1875, said motion was sustained, and it was further ordered by the court that the cause be referred back to the said referee, A. G. Swain, to report the facts in the case, with all the evidence, and that he report, definitely and superficially, all the issues involved in the case.

The defendant below then and there objected and excepted to that portion of order of the court referring the cause back to A. G. Swain for a new trial. The said referee having once tried the cause, and having formed and expressed opinions therein, was an improper person for referee upon a second trial. Upon this objection and exception the counsel for defendant below cites: Seney's Code, sec. 282; *Maxwell v. Stewart*, 21 Wallace, 71; *Johnson v. Wallace*, 7 Ohio (part 2), 62; Nash on Plead. and Prac. 1016; *Gracia v. Sheldon*, 3 Barb. 232; Nash on Plead. and Prac. 1021-1023.

On the twenty-sixth of April, 1875, the said referee filed a second report, and the defendant moved to set it aside

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and for a new trial. The court, therefore, ordered the case back to A. G. Swain, the referee heretofore appointed in the case. On the twenty-second of May, 1875, the said referee having made out and filed a third report in the case, the defendant moved, for various reasons, to vacate the third report and grant a new trial. On the twenty-sixth of May the court overruled said motion, and the third report was in all things affirmed, to which defendant excepted. On the twenty-eighth of June, 1875, judgment was rendered by the court for defendant in error, and against plaintiff in error, for one thousand eight hundred and thirty-eight dollars and eighty-six cents, the amount found due by the referee, and two hundred and sixteen dollars and ten cents costs of suit.

The exceptions taken to the action of the court in sending this case to a referee three different times, might be of sufficient importance to remand this case for a new trial, if the fact did not appear that it was in the first place referred by the consent of the parties, and that the second and third reference was merely done by the court for the correction of errors. But every reference only seemed to increase errors on the part of the referee. And the error of the court consisted in permitting the third report of the referee to be filed and judgment entered on it. Without, therefore, going over the many errors pointed out in the brief of the counsel for the plaintiff in error, none of which is attempted to be met by the counsel for the defendant in error, we think it sufficient to say that the case ought to be sent back for trial, either by a jury, the court, or a referee who will render findings responsive to the issues involved in the case, which surely has not been done by the referee who has put his findings on record in this cause.

Judgment reversed and trial *de novo* awarded.

MCCARTHY v. THE TERRITORY OF WYOMING.

INDICTMENT—ALLEGATIONS.—An indictment for an offense prohibited by statute must allege sufficient facts to bring the offense within the provisions of that special statute. A general allegation at the close of the indictment to the effect that the defendant “was then and there unlawfully and corruptly guilty of malfeasance,” is not sufficient.

ERROR to the Third Judicial District Court for Sweetwater county.

A full statement of the case is contained in the opinion of the court.

W. W. Corlett, for the plaintiff in error, contended that the demurrer to the indictment should have been sustained, for the reason that such indictment did not set forth sufficient facts, etc., and cited: Laws of Wyoming, 1869, 380; Wharton C. L. sec. 364, *et seq.*; *U. S. v. Lancaster*, 2 McLean, 431; *People v. Allen*, 5 Denio, 76; *Van Valkenbury v. State*, 11 Ohio, 404; *Tibbals v. State*, 5 Mis. 596; *State v. Hussey*, 11 Am. R. 209; Bish. on Stat. Crimes, sec. 223; *Cern v. Gibbs*, 4 Dallas, 253; Bish. on Crim. Pro. sec. 612; *Wrocklege v. State*, 1 Iowa, 167; *Herring v. State*, 1 Id. 205; *Chappell v. State*, 8 La. 166; *Green v. State*, 19 Ark. 178; *Gardner v. People*, 20 Ill. 430.

H. Garbanati, for the defendant in error, cites: Laws of Wyoming, 1869, 127; 2 Bouv. 91, 174; 1 Bish. Crim. Pro. sec. 413, and *State v. Stimpson* there referred to.

By the Court, FISHER, C. J.: This was an indictment with five counts, charging the defendant with malfeasance in office in demanding and receiving illegal fees as county clerk in and for said county of Sweetwater. The matters upon which the said indictment was based were as follows, after inserting the caption of the indictment in the usual

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form: That the grand jurors aforesaid, upon their oaths aforesaid, do further present and find that the said Timothy McCarthy, late of the county aforesaid, on the fourth day of February, A. D. 1873, at the county aforesaid, then and there being county clerk as aforesaid, duly authorized and qualified as aforesaid, did then and there, as said county clerk, present a certain bill or voucher to the board of county commissioners of said county (which said board was then and there duly authorized as aforesaid) for the sum of eighty dollars and sixty-five cents, and then and there ask, demand and receive from said county, payment of the same for services alleged to have been by him, as said clerk, performed for said county, and which said bill contained items not lawfully chargeable against said county by said clerk; and the jurors aforesaid, upon their oaths aforesaid, do say that the said Timothy McCarthy, late of the county aforesaid, so being county clerk as aforesaid, then and there did unlawfully present said certain bill of that date to the board of commissioners of said county as aforesaid (which said board was then and there duly authorized as aforesaid), and did then and there ask, demand and receive from said county payment of said bill, which said bill contained items not justly or lawfully chargeable against said county by said clerk; and the said Timothy McCarthy, by his said unlawful act, was then and there wilfully and corruptly guilty of malfeasance."

The fifth count in said indictment is in precisely the same words except in the date of the wrongful act charged and the amount of money wrongfully alleged to have been by said Timothy McCarthy obtained. No reference is made to the first, second and fourth counts of the indictment for the reason that the trial jury found the defendant not guilty in the first and fourth counts, and paid no attention whatever to the second count. A general demurrer was filed to the indictment which was overruled by the court. The overruling of the demurrer is made the principal ground of the errors complained of. The case having

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been submitted to a jury they retired and returned a verdict of guilty on the third and fifth counts of the indictment, and after motions for a new trial, in arrest of judgment, etc., the defendant was called for sentence, when the record shows the following proceedings were had, on the third count of the indictment: "It is therefore ordered and adjudged that the defendant, Timothy McCarthy, pay a fine of two hundred dollars, and stand committed until said fine be paid." The form of sentence on the verdict on the fifth count is in precisely the same language. The counsel for the plaintiff in error takes the ground that the demurrer should have been sustained because the record does not show that the indictment was duly found and returned in open court.

That the indictment is bad for want of certainty, that it is indefinite in not setting out with sufficient certainty wherein the bills or vouchers alleged to have been presented and approved by the board of county commissioners were fraudulent, to whom they were due, nor the particular items in said bills or vouchers upon which the charge of fraudulent action rests. They also say that the court in passing sentence on the accused failed to set out to whom the fines were to be paid, and that in default of their payment the court failed to designate where the defendant was to be imprisoned. In support of the first position as above stated the counsel for plaintiff in error cites Laws of Wyoming, 1869, pp. 157-60; also *Id.* 149-50, 157, secs. 11, 12, 13 *et seq.*; also Wharton's C. L. secs. 364, 366, 374-76; 2 McLean; 5 Denio; *Valkenberg v. State*, 11 Ohio; 11 Am. R. 209; 1 Iowa, 205; and a large number of other authorities. On the second point relating to the defect in the form of passing judgment he cited various authorities.

The general rule relating to indictments is, that they should set out affirmatively sufficient to constitute in themselves allegations to make out the offense charged, and leave nothing to be supplied by inference or proof. It will be found on an examination of the record in this case that the

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statutory offense is not charged from the fact that the indictment fails to allege that the defendant in the court below committed the offense with which he stood charged, while in discharge of his official duties as county clerk; that this is required, to comply with the words of the statute: sec. 96, page 127, Laws of Wyoming, 1869. And again, the indictment does not state wherein the defendant was guilty of malfeasance; it simply charges that Timothy McCarthy was clerk, etc., and that he presented certain bills or vouchers, and did demand and receive moneys on certain items contained in said bills or vouchers, to which he was not entitled, and thereby was "willfully and corruptly guilty of malfeasance." This would seem to be merely a conclusion of law, and fails to say what the items in the bills or vouchers consisted of, leaving the omissions to be supplied by the evidence or to be inferred. This we think is altogether too uncertain and indefinite. In the case of *Tibbals v. The State*, 5 Wis. 596, this doctrine is very fully stated, in a case in which an officer was indicted for making a false return on a writ of replevin; in that case the indictment set out the false return more fully than the prosecution has done in this case, but failed to state the particular item of the return alleged to be false; there was sufficient to show the falsity of the return. But the supreme court held that the indictment was entirely defective, and in the opinion says: It is not enough to charge that the defendant below did falsely return, etc., but must state wherein the return is false. This, we think, is a parallel case, and that it is not sufficient to state that the defendant below demanded and received items in an account to which he was not entitled, and thereby willfully and corruptly was guilty of malfeasance; but it must, before it can stand, specify those items definitely, and the prosecuting officer having failed to thus particularize the items, the indictment becomes bad for want of certainty. This is especially so when we find that the statutes of Wyoming of 1869, after enumerating the fees to be allowed to the county clerk, provides that he shall, for all services not

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enumerated in the statute, be allowed a reasonable compensation for other services; and there is nothing in the indictment to show that the items alleged to have been fraudulently inserted into McCarthy's accounts were not items for which he was to be allowed a reasonable compensation. The indorsement on the instrument, we think, is not so defective as to seriously affect the indictment, but it is not in the form suggested in the statute. The form of the sentence is claimed to be defective from the fact that the learned judge below failed to designate to whom the fine was to be paid, or where the defendant should be confined in the event of his failure to pay the fine.

We do not think it necessary to pass upon these questions from the fact that the defects in the indictment are sufficient to set the whole proceedings aside, independent of any other questions.

Proceedings reversed and case remanded.

GLAFCKE v. O'BRIEN.

PROCEEDINGS IN ERROR.—PRACTICE.—The mere filing of the statutory undertaking in the district court by the plaintiff in error, will not stay proceedings in that court. All the proceedings necessary to take the case to the supreme court must be perfected, and it is only when that is done that the undertaking will act as a supersedeas.

ERROR to the First District Court for Laramie County.

Motion to affirm the judgment of the district court. Judgment was rendered in the district court in favor of O'Brien against Glafcke. Glafcke thereupon filed his undertaking in proceedings in error in the district court, as required by the statute, but took no further action to carry the case to the supreme court. The plaintiff's attorney then obtained an order that said cause be placed on the docket of the supreme court, and that the defendant in the district court show cause why the judgment of said court should not be affirmed.

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E. P. Johnson, for the motion.

D. McLaughlin, in opposition thereto, contended that the cause was improperly docketed in the supreme court, and that no action could then be taken thereon.

By the Court, FISHER, C. J.: And now, to wit, March 28, 1876, the court, after consideration of the rule and answer, find that in order to obtain a stay of execution, or to act as a supersedeas, as provided in the statutes of 1873, the plaintiff in error should commence his proceedings in error, by filing his petition and a transcript of the case in the supreme court, together with an undertaking, as provided by the statutes. And that the mere filing of an undertaking, without commencing any other proceedings in error, is not, in itself, sufficient to give a stay of proceedings or act as supersedeas.

JENKINS v. THE TERRITORY OF WYOMING.

PRACTICE—PROCEEDINGS IN ERROR.—If the plaintiff in error fail to comply with the rules of the supreme court, in having the record prepared as prescribed by such rules, the proceedings in error will be dismissed, and a writ of *procedendo* awarded to the district court.

ERROR to the First District Court for Laramie County.

The plaintiff was tried in a justice's court for a misdemeanor, found guilty and sentenced to pay a fine. On appeal to the district court, the judgment of the lower court was affirmed. The plaintiff in error then filed her petition in error in the supreme court. The attorney for the defendant in error now moves to dismiss the cause for the following reasons, among others, to wit: Because the appellant or plaintiff in error has not caused the transcript attached to the petition in error in this cause to be paged, and has not caused any marginal notes to be placed on said transcript in

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their appropriate places, indicating the several parts of the pleading in the cause, the exhibits, order of the court and bill of exceptions.

W. W. Corlett, for the motion.

E. P. Johnson, opposed.

By the Court, FISHER, C. J.: Motion to dismiss plaintiff's appeal. And now, to wit, March 28, 1876, after hearing arguments of counsel for and against the motion, it is ordered that the said motion be sustained, and *procedendo* to the court below be awarded.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
MARCH TERM, 1877.

TERRITORY OF WYOMING *v.* RITTER ET AL.

OFFICIAL BONDS—LIABILITY OF SURETIES.—Under the statutes of the territory of Wyoming, which provide that the judges of probate of the respective counties shall be *ex officio* county treasurers of the same, an undertaking given for the faithful performance, etc., of the duties of probate judge, is not an undertaking for such performance of duties of county treasurer by the same person, and the sureties on the bond for the former are not liable for the defaults and malfeasance of such probate judge while acting as county treasurer. To make a person an *ex officio* officer, by virtue of his holding another office, does not merge the two into one.

ERROR to the Second District Court for Albany County.

A full statement of the case is contained in the opinion of the court.

M. C. Brown, for plaintiff in error.

The cause of action stated in the plaintiff's petition in the court below is alleged to have accrued on the official bond of George W. Ritter, as judge of probate of the county of Albany, territory of Wyoming. The defendants interposed

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a demurrer to the plaintiff's petition, alleging these grounds : 1. A defect of parties plaintiff ; 2. That the facts stated are not sufficient to constitute a cause of action, etc. And after argument the court below sustained the demurrer, and the plaintiff alleges error of the court in so sustaining the defendant's demurrers.

As to the point made by the demurrer as to the parties plaintiff, we simply say there is no distinction between "the territory" and "the people of the territory:" *People v. Love*, 19 Cal. 22; and see decision of court below on this point.

The next point urged in argument to sustain the demurrer in court below is this: The condition of the bond sued on is not the condition of the bond of the judge of probate as provided by law: For condition of statutory bond of judge of probate, see Revised Statutes, p. 206, sec. 1; for condition of bond sued on, see page—of record. It will be observed that so much of the statutory condition as refers to the duties of the judge of probate as *ex officio* justice of the peace and county treasurer is wholly omitted from the bond sued on. It will be further observed that the breach of the bond assigned in plaintiff's petition is the failure of the officer in the duties required of him by law as "*ex officio* county treasurer." A further examination of the bond sued on shows that there is a general condition to the effect that "he (the judge of probate) shall perform all the duties required of him by law."

Now, then, whether there is error in the proceeding of the court below, as alleged in plaintiff's petition, must be determined by this question, *i. e.*, when there are several conditions required by law to be inserted in a bond, in addition to the general condition that he shall perform all duties, etc., and these special conditions are omitted, and the general condition only retained in the bond, does such general condition cover and comprehend each and all of such special conditions? If yes, then there is error in the record; if no, there is no error.

We cheerfully admit what is claimed by the defense to be

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a general rule, *i. e.*, that sureties on a bond are bound only to the extent of the letter of the obligation. We further admit that where the terms of a contract are clear, definite and certain, there is but one thing for a court to do in reference thereto, and that is, to enforce the obligation according to the clear, unquestioned terms of the instrument; but where there is uncertainty or ambiguity in the terms of the instrument, courts, either of law or equity, will construe it according to the clear intent of the parties, though it prevails against the letter of the contract: Kent's Com. 12th ed. vol. 2, p. 555 *et seq.*; *Cook v. Graham*, 3 Cranch, 220; Parson's Con., 6th ed., p. 498 *et seq.*

We say the meaning of the instrument sued on, considered in connection with the law is not clear, and under the rule settled by Kent calls for and demands construction by the court. The instrument being one that calls for construction, the sense of it must be sought from the law under which it was drawn: 2 Kent, 556. It is evident from the reading of the instrument in question, that it was intended as a bond for the faithful performance of official duty. What the particular duty to be performed and the obligations of the sureties were, can only be ascertained by comparing the contract or obligation with the statute.

Contracts, particularly bonds, and the law must be construed in *pari materia*: Bouvier's Inst. 41, 259, 260, 285, 286, 364; 2 Kent. 459, 460, 556 and notes; Story's Conflict of Laws, 225-233.

If, then, the statute is to be construed with the bond in order to determine the liabilities of the sureties, careful examination of the statute becomes necessary: See Revised Statutes, art. 2, sec. 1, 206.

The statute referred to provides that there shall be a judge of probate for each county, who shall be *ex officio* justice of the peace and county treasurer; who shall execute a bond in "the penal sum of ten thousand dollars," conditioned upon the faithful performance of the duties required of him by law as such judge of probate, *ex officio* justice of the peace and county treasurer.

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Now the bond sued on makes no reference to *ex officio* justice of the peace and treasurer, nor does it contain the special condition as to paying money, etc. If the bond, in addition to the words "judge of probate," contained the words "*ex officio* justice of the peace and county treasurer," there would be no question, it is believed, as to the liability of the sureties under the breach assigned in the plaintiff's petition, because it has long been settled that where the special conditions required by law to be inserted in a bond are omitted, and these are covered by and comprehended within the general condition, the sureties are liable for a breach of such bond to the same extent as if it contained the very words of the statute: *State v. Findley*, 10 Ohio, 51; *Farrar & Brown v. United States*, 5 Peters, 373; *Supervisors etc. v. Van Campen*, 3 Wend.; *Clark and others v. Potter County*, 1 Penn. 159. Nor do the above authorities controvert or conflict with the theory that sureties are bound by the letter only of their obligation, for when we remember the rule, that the bond and law are construed in *pari materia*, the law fixing and establishing the duties to be performed, and the obligation being the faithful performance of all duties required by law, the contract and the law together form the letter of the obligation of the sureties, and a failure in any duty is a breach of the letter of the obligation. How, then, would it be if the words "*ex officio* justice of the peace and county treasurer" were omitted from the bond as well as the special conditions required by law? Would the liabilities of the sureties be in any way effected or changed? It is believed that they would not, and that they would yet be liable under the letter of the obligation by the terms used in the general condition.

The probate act (Revised Statutes, p. 206), declares there shall be a judge of probate for each county. The general election law in force at the time this bond was given provides for the election of judge of probate. Revised Statutes, p. 297, and the organic act provide for the establishment of that office: See Organic Act, sec. 9. But there was no law

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at the time this bond was given that provided for any such office or officer as county treasurer. The probate act referred to provides that the judge of probate (the officer elected by the people) shall qualify by taking the oath of office to support the constitution, etc., and to perform the duties required of him by law, nothing said about treasurer thus far, and that he shall execute a bond in the penal sum of ten thousand dollars, conditioned for the faithful performance of the duties required of him by law as such judge of probate, *ex officio* justice of the peace and county treasurer. That is, his office is judge of probate. It is the judge of probate who is qualifying in office. It is the judge of probate who is giving a bond, and no other officer, but the condition of his bond requiring him to perform other duties than purely probate business.

But it is claimed that the letter of the obligation covers probate business only. All persons are presumed to know the laws under which they live and contract. These sureties are presumed to know what duties are required by law to be performed by the judge of probate. They are presumed to know that but one bond of ten thousand dollars is required of him, and that such penal sum covered all duties required by law. They are presumed by law to know that the duty of receiving and paying out moneys was required of the judge of probate.

Construing the contract and the law together, then, and what is the result. The bond is conditioned for faithful performance of all duties. A part of the duty required by law is receiving and disbursing moneys. The breach of the obligation assigned is the failure to disburse. But it is said there are two offices, and the obligation sued on is for faithful performance of duties of judge of probate, and is not intended to cover the treasurer's office. If there are two offices there must be two bonds. The law only requires one bond, and that is the bond of judge of probate, but conditioned, it is said, for faithful performance of the duties of three distinct and separate offices.

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If this be true, how can liability in the different offices be determined? Are the sureties on this statutory obligation liable in the sum of ten thousand dollars for failure of duty as justice of the peace, and in the same amount as treasurer? If yes, then they are liable to the extent of thirty thousand dollars. Under such circumstances, what would be said as to the letter of the obligation? But the whole obligation is ten thousand dollars, and it is impossible to determine what portion of this amount is intended to secure the performance of the duties of each of these separate offices, if they are separate offices.

When the consideration of the contract is single and entire, the obligation must be taken as a whole, it cannot be divided: See R. Stat. page 206; Bouvier's *Institutes*, vol. 1, page 269, *et seq.*; Parson's *Contracts*, vol. 2, page 517. So we say, as the obligation is to be taken as a whole, and is indivisible. It is an obligation to secure performance of the duties of one office, and that the office of judge of probate, the only office created by law. The term *ex officio*, "by virtue of," as used here, is simply intended to interpose other and additional duties on the office of judge of probate: *People v. Leet et al.*, 13 Ill. 261. In this case the supreme court of Illinois say, in construing a statute providing that the sheriff shall be *ex officio* collector, etc. Suit on official bond: "The sheriff does not hold two separate and distinct offices, but performs the duties previously belonging to two offices. He is styled *ex officio* collector, but this expression is used to designate a particular breach of his duties."

In *Governor v. Redgway*, 12 Ill. 44, and in *Compton v. People*, Id. 290, it was held "that sureties upon an official bond, conditioned for the discharge of the duties imposed upon him within the scope of office."

In North Carolina it was held that a sheriff who by virtue of his office was collector of taxes, held but one office, and the legislature could not divide it: 6 Am. R. 754.

In New York it was held, when the office was clerk of

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the city and county of New York and was also clerk of common pleas, that it was one and the same office: *Warner v. The People*, 2 Denio, 272.

But we say no possible construction will permit the conclusion that the judge of probate and *ex officio* treasurer are two and distinct and separate offices, because, if such were the fact, some provision must be made to fill the office of treasurer. An office can be filled in this territory only as provided by organic act. This act provides that all township, district and county officers * * * shall be elected or appointed as provided by law: See Organic Act, sec. 7. If the office of treasurer is established by law, then the law must provide for its being filled, and the only way it could be filled would be by election or appointment. No such provision is made by law for filling treasurer's office; and so, if there are two offices as contended, the act of the legislature providing for judge of probate filling the office is in direct conflict with the organic act, and, therefore, void. It is a well settled rule of law that courts will not give a statute a construction rendering it void, if from the context it will bear a construction such as to harmonize with the fundamental law.

Again, if it is said there are two offices, and the legislature has undertaken to fill the second office by using the term *ex officio* in connection with the first office, the act would be void as to that part of it. It would be an attempt to fill an office without election or appointment by lawful authority, and by appointment by legislation. Legislature has no appointing power: *People ex rel. Le Roy v. Hurlburt et al.*, 9 Am. R. 103, especially p. 116; also Organic Act, secs. 2 and 7. I think it clear, without argument or presentation of authority, that a man cannot be lawfully legislated into office or out of it. If the construction of the law contended for by the defense is to prevail that there are two offices, then we say the act of the legislature must, for the reasons before presented, be held as unconstitutional and void. But on the other hand, if the court, in pursuance of the general

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rule, place such a construction upon the statute as to make it operative, then we say there is but one office, and that is the office of judge of probate.

But the court below so held upon this point, and we believe in this respect at least the defense is strong and conclusive, and we commend it to the court. But it may be said that no additional duties can be lawfully imposed upon judge of probate. Upon this point we ask the examination of the case in 20 Wallace, 375. No additional judicial duties can be imposed, but ministerial duties can be.

In conclusion, we say there is one office—judge of probate. There is one bond, and that is the bond of judge of probate; and that the general condition covers and comprehends all others. And the sureties and the bond sued on are liable for all acts of Geo. W. Ritter, as judge of probate, and that as judge of probate, Ritter was required to receive and pay out money, and a failure to pay and account for moneys as alleged in the petition is such a breach of the bond sued on as makes his sureties liable.

W. W. Corlett, for defendants in error.

This was an action brought on an official bond given by the defendant, Geo. W. Ritter, as probate judge of said Albany county, for the faithful performance of his duties as said probate judge, and provided as the condition thereof, that if said Ritter shall well and faithfully perform the duties of said office of probate judge according to law, then the bond to be void; otherwise in force. The bond was given for the sum of ten thousand dollars, and the other defendants are sureties on the bond. The sureties demurred to the petition, which demurrer was sustained. Plaintiff excepted, and prosecuted said petition in error to reverse the judgment on said demurrer, which is the only question in the case. The petition, after setting out the terms of the bond, including the condition as above quoted, proceeds to allege that said Ritter did not perform his duties, and as

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required by law in this, that as probate judge and county treasurer he did receive fifty-five thousand dollars, and did abscond with the same and fail to pay the same over, etc. The liability of the defendants in the case is of course determined by the terms of the bond itself. No artful pleading of matters of law can change the rule of liability, neither can such pleading change the law itself, or make a cause of action, for matters of law ought not to be pleaded at all, and counsel make a grave mistake if they imagine that by pleading matters of law, or that by pleading as the legal effect of the bond something not warranted by the terms of the bond as set out in the petition, they can inject into the case an element by which the effect of the demurrer can be avoided. From an inspection of the petition it will be readily seen that the default of Ritter, as alleged, was one occurring in his capacity as treasurer, he being *ex officio* treasurer of the county by virtue of the law. There are two distinct offices, the duties of which are performed by one person.

That the bond is not in the form required by law is not disputed. The law declares that before the probate judge (who it declares shall be *ex officio* justice of the peace and county treasurer) enters upon the duties of his office, he shall execute a bond to the territory in the penal sum of ten thousand dollars, * * * conditioned for the faithful performance of the duties required of him by law as such probate judge, *ex officio* justice of the peace and county treasurer, and for the faithful application and payment of all moneys and effects that may come into his hands in execution of the duties required of him by law as such probate judge and *ex officio* justice of the peace and county treasurer. The bond as given requires him to perform his duties as probate judge; but wholly omits any requirement whatever as to his duties as justice of the peace and county treasurer: See Laws of Wyoming, p. 206, sec. 17. The contention in this case is this: On the one hand it is claimed that the duties of the probate judge, as such, include his

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duties as county treasurer and justice of the peace, and therefore the bond which holds him for the performance of his duties as probate judge, holds him likewise to the performance of his duties as justice of the peace and county treasurer, because the latter are included in the former. On the other hand, the defendants claim that the duties of Ritter as justice of the peace and county treasurer are not included in his duties as probate judge, nor are they to be performed as such; but on the other hand are additional to and beyond his duties as probate judge, and have to be performed in a capacity entirely different from that of probate judge.

The office of probate judge is one provided by the organic act. It is a judicial office, as the terms themselves import. As a probate judge, he constituted a part of the judiciary of the territory and of its judicial system, and as a probate judge, it has been decided that not even the legislature can confer upon him any judicial power, save and except such power as naturally, according to the general legal understanding, appertains to the office as such: *Ferris v. Thigley*, 20 Wallace, 375; 25 Cal. 520; 6 Ohio; 9 Cal. 286.

Whatever the probate judge does as a probate judge he does, therefore, as a judicial act. He may well be authorized to do other acts and perform other duties by and under the law, but when he thus acts he does not act probate judge. Any other view would be absurd. A judicial act must be the determination of some controversy, according to law, between proper parties. Therefore, when a court or judge acts as such, it, in the very nature of things, performs a judicial function. Now, in the very nature of things, whatever a man does as a county treasurer cannot be a judicial act. It must be a ministerial act, and nothing else. Therefore, to say that when Ritter received the county money he did it as probate judge, is to allege that he did a judicial act, when, in the very nature of things, it could not be such. The argument of the plaintiff brings him to this dilemma, and no reasoning can extricate him from it. This

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tribunal might be empowered by law to receive and pay out the public revenue to this territory, but in doing so, would any one pretend that it did so in its capacity of a court? A court is a place where justice is judicially administered. Will it be pretended that if the person who accidentally fills the position of judge of a court, also by law receives and pays public moneys out, that in doing so he is judicially administering justice? And yet, if he is doing so as a court, that is just what he is doing, because a court, as such, can do nothing else. The legislative intent, in the case of our probate judges, was that they should also act as justices of the peace. Now, if the duties of a probate judge, according to the legislative intent, include those of a justice of the peace, then we would have this anomalous state of affairs, that when the probate judge entertained a common law action of assumpsit in favor of A. against B., for fifty dollars and costs, he would be acting as probate judge, but as probate judge, according to the case of *Ferris v. Thigley*, he could not entertain such an action, would have no jurisdiction.

Again, seeking the legislative intent, if the legislature considered that the probate judge was to perform the duties of justice of the peace and county treasurer, as probate judge, why did they provide that he should be called a justice of the peace at all? The suggestions are all very pertinent, as showing the meaning of the legislature in passing the section of law above alluded to.

The legislative intent is further manifested, in fact made most clear, by other sections of the law, to which attention is now directed: see Laws of Wyoming, 206-209, secs. 4-15; 560-564, secs. 42-61; 267, sec. 96.

Having thus considered these general and to some extent preliminary questions, let us see what the rule is as to the liability upon a bond, and as to the right of action thereon. We deem the law to be, that when sureties are sought to be made liable on a bond, they must be brought within the letter of the bond: they stand upon the words of the bond,

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and if that does not make them liable, nothing can. The cases speak a uniform language on this subject: *Myers et al. v. Parker*, 6 Ohio St. 501; *Evans v. Bradley*, 17 Wend. 422; *State v. Medary*, 17 Ohio, 565; *McGooney v. State*, 20 Ohio, 93.

The defendants in this case do not claim that the bond is void. It is not a good statutory bond, but is good as a common law bond, and may be recovered on in any case where it is alleged and proved that said Ritter has not faithfully performed the duties required of him by law as probate judge. The duties of Ritter as treasurer are not included in the duties to be performed by him as probate judge, his duties as treasurer being outside of and beyond his duties as probate judge, and not included in them, according to all the authorities this bond gives no cause of action for a default as treasurer: *Farrar v. Brown*, 9 Curtis's Dec. 386. In this case the court had no doubt but that the duties omitted from the terms of the bonds given were included in the general terms incorporated in the bond, but had so much doubt even in that case as to whether there could be a recovery when the default was in one of the particulars omitted in the bond, that the court declined to pass its opinion as to liability in such a case, an opinion on that point not being necessary to a determination of the case: See case last cited, p. 390. In the case last cited, the court says, that but for the statute which was express in requiring the condition of the bond to express that the obligor should faithfully disburse the public moneys coming into his hands, etc., there was no doubt but that it would be open to proof that the distribution of money was one of the known and habitual duties of the office of surveyor, and included in the general words. But in that case the court hesitated so to say, because the statute in express terms required the bond to say that he should faithfully disburse the money received. But supposing that, in a case like the present, the plaintiff would not be allowed to prove that the receipt of the county revenues

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and taxes is one of the known and habitual duties of the office of probate judge, could such proof be made. Is not that matter settled by law, and does not the law absolutely settle it by declaring that it must be as county treasurer that he receives such moneys and disburses them: *State of Ohio v. Findley*, 10 Ohio, 51. But it is claimed on behalf of the plaintiff that Ritter being *ex officio* treasurer by reason of the fact that he was probate judge, his duty as treasurer were simply a portion of his duties as probate judge, that there was but one office, and that one was probate judge; that the offices were not separate and distinct offices, but that the duties of the one were simply swallowed up and absorbed by the other. When this cause was argued below, it unfortunately was heard without the light of any authority expressly in point, and hence had to be determined upon reason and the general analogies of the law rather than upon the express adjudication, especially as to the point just mentioned. It was supposed that no express authority was accessible. Fortunately, however, the question has been well considered in numerous cases by one of the highest and most respectable courts of the Union, and the emphatic declaration made that to make a person an *ex officio* officer by virtue of his holding another office, does not merge the two into one, nor does it thereby make the duties of the other: See *People v. Edwards*, 9 Cal. 286; *People ex rel. Anderson v. Durick*, 20 Cal. 94; *People v. Love*, 25 Cal. 520; *Lathrop v. Brittain*, 30 Cal. 680; *People v. Ross*, 38 Cal. 76. From an examination of some of the cases just cited, it will be seen that the court holds that a recovery can be had upon a sheriff's bond for a default as tax collector, but the right to recover is placed upon the sole ground that the state of California by express law had declared that the sheriff's bond as such should be liable for all taxes collected by him; and in the other cases not subject to the provision of this express law, it was emphatically held that there could be no recovery upon the bond of one office for a default in the other. It is believed that the authorities just

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cited remove all doubt as to the correctness of the ruling of the court below (if any such doubt ever existed), and that this court with the aid of these decisions, can have no hesitation in affirming the judgment of the court below.

By the Court, BLAIR, J.: This is an action brought on a penal bond, executed by George W. Ritter, and Henry Bath, A. T. Williams, Charles Kuster and M. G. Toun, his sureties, to the territory of Wyoming, as judge of probate, and who, as the petition of plaintiff alleges, was also *ex officio* county treasurer of Albany county. The petition proceeds to set forth the duties of the judge of probate as *ex officio* county treasurer, and avers that it is made his duty by law to receive all moneys belonging to the county and territory, from whatever source they may be derived, and shall pay the same out only on the order or warrant of the board of county commissioners, as prescribed by law.

That he is required to keep a true and just account of all receipts and expenditures, of all moneys that shall come into his hands; to report at each regular meeting of the county commissioners the amount of moneys received and expended as treasurer during the intervening time, and to safely keep all moneys that may come into his hands as judge of probate and *ex officio* county treasurer, and to perform all the duties required of him by law. The petition further alleges that after Ritter executed the bond aforesaid, he took upon himself the office of judge of probate, and as such *ex officio* county treasurer, and assumed all the duties thereof. The plaintiff then assigns as a condition of the breach of said bond, that said George W. Ritter, judge of probate as aforesaid, and as such *ex officio* county treasurer of Albany county, did not faithfully perform all the duties required of him by law, but made default, and wholly neglected and refused so to do.

That in the year 1875, and up to the time of bringing the plaintiff's action, the said Ritter, as judge of probate and *ex officio* county treasurer, received large sums of money,

which he grossly neglected and refused to safely keep, disburse and account for, and that he wholly neglected and refused to keep just and true accounts of his receipts and expenditures of all moneys coming into his hands, by reason whereof the said Ritter had become a defaulter in the sum of fifty-five thousand nine hundred and thirty-six dollars and seventy-four cents, and had absconded with the same.

The petition concludes in the usual form, and prays judgment against the defendants for ten thousand dollars, the penalty of the bond.

The sureties of Ritter, by counsel, appear and demur to the petition of the plaintiff, and assign two causes of demurrer:

1. That the plaintiff has no legal capacity to sue in this action, in this, that by law the action should have been brought in the name of the people.

2. That the petition of the plaintiff does not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff. The demurrer to the plaintiff's petition was sustained in the court below, and the case came to this court for review.

The first cause of demurrer having been waived by counsel in their argument before this court, it will not be considered. We will, therefore, consider the second cause of demurrer. This cause of demurrer raises the question (which is the only one in the case) as to the liability of the sureties of Ritter for the failure of Ritter to perform the duties required of him by law as county treasurer.

The first inquiry that would seem to present itself is, whether the office of judge of probate and county treasurer are one and the same office, or two separate and distinct offices, and in either case are the sureties of Ritter liable in this action. By a careful examination of the act creating the office of a judge of probate, found in the code of 1869, article 2, chapter 4, it will be seen that independent of the first section, there are but two, viz., four and five, where the

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judge of probate is styled county treasurer. From the end of the fifth section to the end of article 2, the person who is required to perform the duties of treasurer, is styled either county treasurer or treasurer. On page 358, section 49, of the code of 1869, it is made the duty of the county treasurer to sign and deliver to the purchaser of any real estate, sold for the payment of taxes, a certificate of purchase, etc., and section 54 gives a form of deed conveying to the purchaser of said property, so sold as aforesaid, which deed is signed simply, "E. F., treasurer." In every instance, therefore, where the person is referred to, who is to discharge the duties of county treasurer, save in the two instances we have mentioned, he is styled either county treasurer or treasurer.

The conclusion would therefore seem almost inevitable if we look to the act alone creating the office of judge of probate, to ascertain the intent of the legislature, that it was the intent, and the legislature did create two separate and distinct offices; the duties of each to be performed by one and the same person. The correctness of this view as to the intent of the legislature is not lessened, but on the contrary greatly strengthened by the fact that the duties of the office of judge of probate and that of county treasurer have no connection one with the other; each are clothed with different and distinct powers; each to perform different and distinct duties; the functions of the former being wholly judicial, the latter purely ministerial.

The question, however, has been well considered by one of the most respectable courts of the Union, and has, as we think, ceased longer to be debatable. The supreme court of California has held, in numerous cases, that to make a person an *ex officio* officer by virtue of his holding another office, does not merge the two into one: *People v. Edwards*, 9 Cal. 286; *People v. Love*, 25 Id. 520; *Lathrop v. Brittain*, 30 Id. 680; *People v. Ross*, 38 Id. 76.

Assuming, therefore, that when the legislature declared that the judge of probate should be *ex officio* county treas-

urer of his county, two distinct offices were created, we are brought to consider the next question which arises in this case, viz.: Are the sureties of Ritter liable in this action for the failure of Ritter to discharge all the duties imposed upon him by law as county treasurer. The laws of this territory declare that the judge of probate, who shall be *ex officio* justice of the peace, and county treasurer of his county, shall give bond to the territory in the penal sum of ten thousand dollars with two or more sureties; conditioned for the faithful performance of the duties required of him by law as such judge of probate, *ex officio* justice of the peace and county treasurer, and for the faithful application and payment of all moneys and effects that may come into his hands in execution of the duties required of him by law as such judge of probate and *ex officio* justice of the peace and treasurer. The condition of the bond executed by Ritter, and upon which this action is founded, is as follows, viz.: Now, therefore, if the said George W. Ritter shall well and faithfully perform all the duties of said office of judge of probate according to the laws of said territory, then the above obligation to be null and void, otherwise to be and remain in full force and effect. Here it will be observed that the condition of the bond upon which this action is being prosecuted, would seem to be limited to and covers only the duties of judge of probate.

If this be so, the vital question arises, are the sureties of Ritter liable in this action for the failure of Ritter as *ex officio* county treasurer to faithfully discharge all the duties required of him by law as county treasurer; or in other words, are the legal liabilities of the sureties of Ritter the same under the condition of the bond sued on as if it contained the exact words of the statute? To ascertain the extent and liabilities of sureties who execute bonds of this character, we have only to apply the well settled rule of law applicable in such cases, and all difficulty at once disappears. The rule is simply this, that the bond must speak for itself, and the law is that it must so speak; that the

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liabilities of sureties are limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words of the bond do not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail: *State of Ohio v. Medary et al.*, 17 Ohio, 565; *Myers et al. v. Parker*, 6 Ohio, 501; *Evans v. Bradley*, 17 Wend. 422.

Applying the above rule of construction in endeavoring to ascertain the liabilities of the sureties of Ritter under the condition of the bond in question, it would seem that they could be held liable only for the acts of Ritter as judge of probate *per se*, and not for his neglect or failure to discharge the duties of county treasurer. But it has been argued by counsel for plaintiff in error with great earnestness, that when the condition of a bond is cumulative, the omission of one condition cannot invalidate the bond so far as the other operates to bind the party. Unquestionably this is true. But the question is one of much more difficulty whether where the law is expressed that the condition of the bond shall be both for the faithful performance of all the duties imposed upon him by law as judge of probate, and the faithful application and payment of all moneys and effects that may come into his hands in execution of the duties required of him by law as such judge of probate, and *ex officio* county treasurer, and the former only is inserted, can the latter be held to be comprised within the general words of the former? We do not hesitate to say they cannot: *Farrar & Brown v. United States*, 9 Curtis, 386.

We are therefore of opinion: First. That where the judge of probate is made by express statute *ex officio* county treasurer of the county, that two distinct offices are thereby created by law; Second. That where the condition of the bond executed by the judge of probate is only for the faithful discharge of the duties of judge of probate *per se*, the

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sureties on said bond are not liable for the failure of the judge of probate as *ex officio* county treasurer to perform the duties of county treasurer required by law.

For these reasons, we think there is no error in the judgment of the court below.

Judgment affirmed.

WYOMING NATIONAL BANK v. DAYTON.

EVIDENCE—NEW TRIAL.—The court will not set aside a verdict and grant a new trial upon the sole ground that the verdict is not sustained by sufficient evidence, unless it is manifest that the jury acted in a total disregard of the evidence, or acted against the great weight of the evidence to such an extent as to show that the verdict was the result of improper motives.

ERROR to Second District Court for Albany county.

A full statement of the case is contained in the opinion of the court, except as to the charge to the jury in the district court, which was as follows:

At the request of the defendant, the court charged the jury that: 1. To entitle the plaintiff to recover in this action, he must establish, by a preponderance of evidence, two facts: First, that the Wyoming National Bank was entitled to the immediate possession of the wood in question: and, Second, that the defendant, Dayton, was wrongfully detaining the same at the time this action was commenced. Under the pleadings and evidence in this case, the right of possession depends upon title and ownership. Therefore, if the jury find, from the evidence in this case, that the plaintiff, the Wyoming National Bank, was not the owner of the wood in question at the time the writ of replevin issued in this case, the jury must find for the defendant, and assess such damages as they may think right and proper. No sale of personal property is good *prima facie*, as against *bona fide* attaching creditors, or innocent pur-

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chasers, without a delivery of the goods and chattels sold; and if the jury believe, from the evidence in this case, a contract of the wood in question was made between W. S. Bramel and the Wyoming National Bank, but previous to delivery of the wood to the bank it was attached by the creditors of Bramel, then Sheriff Dayton, the defendant in this suit, was not wrongfully detaining the property in question, and is entitled to recover damages in this action. 2. If the jury believe, from the evidence in this case, that there was a contract between W. S. Bramel and the Wyoming National Bank to transfer the proceeds of the wood only to the bank, such contract did not constitute a sale of the wood, or pass to the bank the title, ownership or right of possession thereof. 3. The measure of damages in this case, if the jury find for the defendant, must be the amounts claimed, and for which the several writs of attachment issued against W. S. Bramel, with legal interest thereon, to wit: twelve per cent. from the time the writs issued, provided the value of the property in question equals or exceeds that amount. The plaintiff requested the court to charge the jury as follows, to wit: but the court refused, to which refusal the plaintiff duly excepted: First, there is no competent evidence before the jury that the defendant, Dayton, ever levied upon and took into his possession the wood in controversy in this action; and the court instructs you that so far as any rights of the defendant are based upon such defense, they are not made out. Second, there is no competent evidence before you that the defendant, Dayton, by virtue of the writs of attachments described in the defendant's answer, levied upon and took into his possession the wood in controversy in this action, and you can award him no rights whatever by virtue of such claim. The attaching creditors of W. S. Bramel could obtain, by the service of the writs of attachment described in the answer in this action, if it has been shown that there were any such creditors, no better or higher right than said Bramel had in the property in controversy in this action. At the time of the service of

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said writs of attachment, if said writs of attachment were served, the rights which said creditors would obtain by the service of said writs of attachment, would be at most but a lien, which in law is postponed to all prior liens, whether equitable or legal, which have been or were asserted before said property was sold on execution.

The plaintiff also requested the court to give the following instructions to the jury, which were given as requested, and numbered by the court from 6 to 13 inclusive: 1. That the defendant, Dayton, claims a special interest and ownership in the property replevied in this action, by virtue of levies upon the same, and by virtue of certain writs of attachment, as set forth in the answer of the defendant. If you find that such levies were made by the defendant, then the court instructs you that the defendant, Dayton, by means of such levies, could get no better or greater interest in the property so levied upon than W. S. Bramel, the defendant named in such writs of attachment, had at the time such levies were made; 2. If you find from the evidence in this case that W. S. Bramel, the defendant named in the writs of attachment, by virtue of which the defendant alleges he levied upon and took into possession the property in controversy in this action, for a valuable consideration received by him from the plaintiff, agreed with the plaintiff that the consideration to be paid for said wood by the Union Pacific Railroad Company to said Bramel (if any such consideration was to be paid) should be paid to the plaintiff, and that any voucher for said wood should be made payable to said plaintiff; and, in addition, agreed with the plaintiff to deliver said wood to said railroad company for the benefit of the plaintiff, and if such agreement with the plaintiff was made before the defendant levied upon and took possession of said wood, if it was so levied upon and taken into possession, then the court instructs you that any right which the defendant obtained by such alleged levies, would be subject to the obligation of said Bramel in relation to said wood, and the agreement of said Bramel with said plaintiff would

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have to be performed and carried out before the defendant could obtain any right or interest in said wood by virtue of levies made under the writs of attachment described in defendant's answer; 3. So far as the defendant in this action makes any claim to the wood in controversy in this action, by reason of having levied upon and taken possession of the same, by reason of certain writs of attachment, that defense on the part of the defendant is an affirmative one, and the defendant, before he can recover in this action by reason of such defense, must prove the same by a preponderance of evidence, and if it is not so proved by a preponderance of evidence, then you cannot find for the defendant upon that defense; 4. In case you find for the plaintiff in this action, you shall assess adequate damages to the plaintiff for the illegal detention of the property; such damages would be the interest on the value of the property at twelve per cent. per annum during the time the wood was so detained by the defendant, if it was so detained; 5. If the plaintiff in this action purchased the wood in controversy in this action from W. S. Bramel, before the defendant levied upon the same, if he did so levy and if said wood was delivered at a place agreed on between said Bramel and the plaintiff before any such levy was made, then the defendant acquired no right whatever to said wood by such levy, and you should in that case find for the plaintiff; 6. The court instructs you that the defendant's defense, that he was entitled to the wood in question by reason of levies made by virtue of certain writs of attachment, is not a good defense in this action, unless the evidence in the case shows you that such levies were made upon the identical and same wood replevied in this action, and you cannot take it for granted that the wood so replevied is the same wood that was levied on by the defendant, but such fact must have been proved to you by the evidence in this case; 7. The court instructs you that the defendant, Dayton, on levying upon the property in controversy, if you find he did so levy, with the writs of attachment described in the answer in this

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action, acquired only such interest in said property as W. S. Bramel then had in the property, and such levies by the defendant would be subject to any valid contracts made by said Bramel in respect to said property at the time such levies were made; 8. If the jury find for the plaintiff in this action, the form of the verdict should be as follows:

“Wyoming National Bank, plaintiff v. Thos. J. Dayton, defendant. We, the jury, find for the plaintiff, and assess its damages at \$——. ——, foreman.”

The court also instructed the jury in writing, on its own motion, as follows: Gentlemen of the jury—The petition in this cause sets up fully the cause of action, or the claim of the plaintiff, and the answer of the defendant sets up the defense to the plaintiff's action on the part of the defendant. The facts in the case are few, and by applying the law to them, given you by the court, you will have, I think, but little difficulty at arriving at a just and proper verdict. Counsel have requested the court to give you certain instructions. I have marked them “instructions given,” and numbered them from one to thirteen, inclusive, and made them a part of this charge, and you will consider them as such. You are the sole judges of the weight of evidence and the credibility of witnesses. The instructions referred to above contain the law of the case, and I have not deemed it necessary to add anything more.

W. W. Corlett, for plaintiff in error.

This was an action brought by the plaintiff in error against the defendant in error, in the district court of Albany county, to recover the possession of five hundred cords of fire-wood, alleged to belong to the plaintiff, and to be wrongfully detained by the defendant. The defendant answered: 1. By a general denial; and, 2. That he was sheriff of Albany county, and as such sheriff, by divers writs of attachments duly issued out of the district court of

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said Albany county, against one W. S. Bramel, he levied upon and took possession of said wood, which he alleges was the property of said Bramel at the time of said levy, and holds the said wood by virtue of said facts so alleged.

The property in controversy in the action was taken and delivered to the plaintiff in the action, and the venue of the action was changed to Carbon county, where, at the September, A. D. 1876, term of the district court in that county, the cause was tried, and a verdict rendered for the defendant for two thousand five hundred dollars. The plaintiff then filed a motion for a new trial in the case, which was overruled, and judgment entered on the verdict. This proceeding in error is prosecuted for the purpose of reversing said judgment, because of errors of various kinds occurring during the trial of the cause and excepted to by the plaintiff, which errors will be distinctly pointed out as they are hereafter considered.

The first error alleged is, that the court below erred in refusing to set aside the verdict of the jury, because the said verdict is not sustained by sufficient evidence and is contrary to law. This is a question of fact, so far as any argument upon it is concerned, and will, therefore, be argued orally at the bar upon an examination of all the evidence in the case, in connection with a reference to such authorities as are believed to lay down the rule as to what the action of this court should be in passing upon said alleged error.

The next error complained of is, that the court erred in giving to the jury instruction one requested by the defendant: See *Farrell v. Humphrey*, 12 Ohio, 112; *Oaks v. Wyatt*, 10 Id. 344; *Williams v. West*, 2 Ohio State, 82; *Kuhland v. Sedgwick*, 17 Cal. 123. These authorities show conclusively that the allegation of ownership is immaterial and surplusage, and that the right of immediate possession is the question to be tried. Again, the time which was material was the date of the execution of the writ.

The fifth error complained of is, that the court below

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erred in giving to the jury instruction two, requested by the defendant. On this question see *Hobben v. Bidwell*, 16 Ohio, 510; 2 Kent's Com. 393; 3 Johns. 170; 1 Parsons on Contracts, title "Sale," to show that delivery is not necessary to constitute a sale. Retention of possession is only *prima facie* evidence of fraud: *Hambice v. Vanhuter*, 9 Wis. 453. Purchaser takes only the interest of the execution or attachment defendant: Rorer on Judicial Sales, sec. 1051 *et seq.*; *Haldman v. R. P. Co.*, 2 Handy, 101; Seney's Code, sec. 225, note; Herman on Execution, 418, 485, 499, 500, and c. 18 and cases there cited; Drake on Attachment, sec. 254.

The sixth error complained of, is that the court below erred in giving to the jury instruction three, requested by the defendant. On this proposition see the authorities cited under last head. The instruction completely ignores the equitable rights of the plaintiff in error and the distinction between a complete sale to the purchaser without notice, and the lien of a creditor obtained by attachment with notice.

The next material error, is that the court below on the trial of this cause erred in allowing the defendant to give in evidence to the jury transcripts of certain judicial proceedings and records, the same not being properly authorized, and especially in permitting the returns on certain writs of attachment to go to the jury, the same not being in any way certified or authenticated.

This objection goes to the failure of the clerks' certificates to show that the returns on the writs were true copies of the original: *Phillips v. Elwell*, 14 Ohio St. 240. On the question of practice as to the failure of the plaintiff to except to the order of the court overruling the motion for a new trial: See *Hause v. Elliott*, 6 Ohio St. p. 497, followed in 12 Ohio St. 428.

In the question of retention of possession by vendor after a sale, it is held even by the old English cases, that if the subsequent possession by the vendor appear merely as the condition of an executory contract, then such retention of

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possession is no evidence of fraud. Now, on the theory of the defendant in this case, the case itself comes exactly within this rule: See Story on Sales, sec. 518; *Edwards v. Harben*, 2 S. R. 587; *Hamilton v. Russell*, 1 Cranch, 309, sec. 1; Curtis Dec. 415; Story on Sales, secs. 521, 522, 526, 526 a, 529.

E. P. Johnson and M. C. Brown, for the defendant in error.

Dayton, as sheriff of Albany county, levied upon certain wood by virtue of several writs of attachment running against one W. S. Bramel. The wood was seized as Bramel's property, and replevied from the sheriff's possession by the plaintiff in error, against whom judgment was rendered in the court below.

The first, second and third errors involve questions of fact and cannot be seriously argued. If so they avail nothing, for the first will not ordinarily be noticed by an appellate court. The second and third could be cured by *remittitur* if found to exist, but a computation shows the verdict to be correct.

The fourth error complained of has no foundation. The instruction number one correctly states the law, and the right to the possession by plaintiff having no foundation other than ownership, it was proper to direct the judge's attention to that fact. The ownership was material in this case, as it constituted the basis of plaintiff's claim to the right of possession.

The next error complained of is the giving of instruction number two, requested by defendant. The instruction might, perhaps, be said to be unnecessary and irrelevant, because, while title was claimed by plaintiff, the testimony of Ivinson and Swain together show there never was a sale of the wood. Nor was there even an attempt to do more than take an assignment of the proceeds when the wood should be delivered by Bramel to the railroad company.

Argument for Defendant in Error.

So the instruction could do harm, and nothing is better settled than the principle that error which does no injury to the litigants will not be allowed to disturb a judgment: 3 *Graham & Wat.* 862-873; 2 *Nash*, 1046; *Powell on App. Pr.* 157-67, 189; *Hill. on New Trials*, 32-52. The instruction is not erroneous, however, in itself. The claim in the pleadings, however badly supported by testimony, was that the bank had absolutely purchased the wood. If so, there should have been a delivery, to make a complete sale as to third parties: 1 *Pars. on Con.* 519, 527, 529; *Story on Sales*, sec. 296. But retention of possession by the vendor of personal property was, at common law, or rather statutes of Elizabeth, a fraud in law, and avoided the sale. While the doctrine is modified in many of the United States, it is adhered to in many, and especially by the supreme court of the United States and the federal judiciary: 1 *Smith's Leading Cases*, 523; 1 *Pars. on Con.* 429; 2 *Kent*, 12 ed. 515-532; 1 *Cranch*, 309-316; 4 *Mason C. C.* 312; *Story on Sales*, sec. 518 and on.

Such being the rule adhered to by the supreme court of the United States, it is binding upon the courts of this territory, as it is the appellate court, whose decisions are not only entitled to respect but have the weight of authority. It will be seen that the instruction does not declare the law as between the parties to the contract, but between them and the creditors of the vendor, and the law is correctly stated. Under the testimony, the court would, at any stage of the trial, have had the right to assume, as an undisputed fact, that the sheriff detained the wood by virtue of attachment writs described in the answer. A party has the right to require the best proof, but secondary proof admitted without objection is sufficient: *Powell on App. Pr.* 178, 182; *Phill. on Ev.* 470; 2 *Id.* 433. But the writs were returned with the sheriff's return thereunder, and when filed, the returns become an inseparable portion of the writ and of the records, so that certification of the writ included the return.

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But the record shows that in this case all exceptions were waived. The rule of this court requires all points that are to be relied on in this court, to be first presented to the court below in a motion for new trial. That was done in this case, and no objection or exception was made to the order of the court overruling the motion for new trial, whereby every error that had been complained of was waived. And this really comes up here with a record showing such waiver.

By the Court, BLAIR, J.: This action was brought in the district court of Albany county, and the venue changed to the county of Carbon; a trial was had, verdict rendered and judgment entered thereon, at the September term, A. D. 1876.

It is brought here for review by the plaintiff below, who is now the plaintiff in error in this court. It appears, by the petition in this case, that the plaintiff in error instituted an action in replevin in the district court of Albany county, against the defendant in error, to recover the possession of five hundred cords of wood. The petition alleges that the plaintiff was the owner of said wood, and was entitled to the immediate possession thereof; that the defendant, wrongfully and unjustly, detained in his possession the said wood, and had so detained the said wood from the plaintiff for the period of thirty days, to the damage of the plaintiff in the sum of five hundred dollars.

The answer of the defendant to the plaintiff's petition: 1. Sets up a general denial to all matters in said petition contained; 2. Denies that the plaintiff was the owner of the wood in question, or was entitled to the immediate possession thereof, and further denies that the defendant ever took or held the wood in question, or ever unlawfully detained the possession of the said wood from the plaintiff; 3. The defendant alleges that, as the lawful sheriff of Albany county, and by virtue of certain writs of attachment, issued out of the district court of said county, directed to

him, the sheriff of said county, against one W. S. Bramel, he levied upon said wood as the property of said Bramel, and took the same into his possession; that at the time of the said levy, the said Bramel was the owner of and in the possession of said wood, and by reason of said levy, he, the defendant, as sheriff, had a special property in said wood, to the amount of twenty-three hundred dollars, for which he prayed judgment. The wood in question, levied on by virtue of the writs of attachment, was delivered to the plaintiff.

There are two questions which are necessarily raised by the pleadings in this case:

1. Was the plaintiff in error the owner of the wood in question, and entitled to the immediate possession of the same at the time this suit was instituted?

2. If so, did the defendant in error wrongfully detain the property in controversy from the plaintiff?

Before the plaintiff could recover, it is manifest that he must substantiate the first proposition by a preponderance of evidence. The jury having found for the defendant in error and assessed his damages at two thousand five hundred dollars, the plaintiff brings this case here upon a writ of error in order that certain questions of law arising in the trial of the cause may be reviewed by this court. The first, second and third errors assigned by the plaintiff in error involve questions of fact, the determination of which were the special province of the jury. The court will not set aside a verdict and grant a new trial upon the sole ground that the verdict is not sustained by sufficient evidence, unless it is manifest that the jury acted in a total disregard of the evidence, or acted against the great weight of the evidence to such an extent as to show that the verdict was the result of improper motives: *Min-turn v. Burr*, 20 Cal. 48.

After a careful examination of the evidence as contained in the record, we are not only satisfied that the verdict is warranted by the evidence, but we find it difficult to see how

the jury could have arrived at any other conclusion than they did. As to the amount of damages assessed by the jury, we are of opinion that the measure of damages should have been for the aggregate amounts claimed in the attachment writs under which the sheriff seized the wood in question, and a remittitur is therefore directed to be filed by the defendant in the court below covering the interest calculated by the jury upon said amounts, which amount we find to be five hundred and seventy-three dollars and twenty cents.

As to the fourth error assigned by the plaintiff in error, we are of opinion that the plaintiff having put the title of said wood in issue by the pleadings, claiming his right of possession solely on that ground in his petition and by his testimony, the instruction complained of correctly states the law. As to the other parts of said instruction the record shows that the writs were issued and served on the same day, and that no rights of third parties intervene between the issuing and the service of the writs. The error, if it be error, is therefore harmless.

The fifth error assigned is as to the giving of the second instruction asked for by the defendant. It appears from the evidence in the case that no question is involved or arises between the vendor or the vendee, but solely between the vendee and the attaching creditors of the vendor. We think the instruction is applicable to the pleadings and evidence in the case. The plaintiff rests his rights to recover possession of the wood in question on his absolute ownership, derived or acquired by an unconditional purchase from W. S. Bramel.

It is not claimed that there was a delivery of the wood, and the record shows that the full and absolute control and possession of the same was publicly and privately retained by Bramel after the alleged unconditional sale. And while it is held in many states that the retention of possession of personal property by the vendor after an unconditional sale is only *prima facie* a fraud, the federal courts hold it to be a fraud in law, and as against creditors and *bona fide* pur-

Points decided.

chasers renders the sale void: 1 Smith's Leading Cases, 523; 1 Cranch, 309, 316; 4 Mason's C. C. 312; 2 Kent, 515-532.

The supreme court of the United States being the appellate court to which this case must go if appealed, we feel bound by its decision, and shall so hold in this case. In that view there is no error in the instruction. But there is another view of the case which we take that, without reference to the merits of the instructions complained of, renders the question raised by it immaterial and the instruction itself harmless, even if erroneous. The jury unquestionably found from the evidence that there was no sale of the wood by which title or right of immediate possession to it passed to the bank. We think the preponderance clearly shows that there was nothing more than an arrangement made by which, when Bramel had delivered five hundred cords of wood to the railroad company the proceeds were to go to the bank. We find no error in giving the instruction number three complained of as the sixth error. The remittitur ordered disposes of the objection made to the fourth instruction asked and given at the request of the defendant. We find nothing in the record making it necessary to examine the other errors complained of, as some, we think, are inapplicable, and others were not seriously insisted on in the argument of the cause; for this reason they are overruled.

Judgment affirmed.

NORTH ET AL., ASSIGNEE, ETC., v. McDONALD ET AL.

BANKRUPTCY.—Assignees of a bankrupt before they can recover of third parties for an alleged fraudulent purchase of property of the bankrupt must, upon the trial, prove all the facts necessary to bring such transaction within the provisions of the bankrupt act of the United States. This refers to the question of time as well as to all others.

NONSUIT.—Where assignees of a bankrupt brought suit to recover the value of certain property purchased of him on an alleged fraudulent sale, and on the trial failed to prove that such sale and the filing of the petition in bankruptcy occurred within two months' time of

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each other, according to the provisions of section 5128 of the bankrupt act, but on the contrary did prove that two months and twenty-three days had elapsed between the occurrence of the alleged fraudulent purchase and the filing of the petition in bankruptcy: *Held*, that it was not only right for, but the duty of, the district court, on motion of defendants, to grant a nonsuit.

ERROR to the Third District Court for Laramie County.

A sufficient statement of the case is contained in the opinion of the court.

W. W. Corlett, for plaintiffs in error, contended that the nonsuit was improvidently and irregularly granted, for the reasons: That the action was brought under the proper section of the act, and one giving more than two months in which to commence proceedings; that there was evidence of fraud for the jury to pass upon, and cited: *Bump on Bankruptcy*; 1 Dillon, 24; 14 Wallace, 244; 21 Id. 360; 7 Blatchford, 284; 8 Id. 488; 11 Ohio, 453; 4 Ohio St. 628.

E. P. Johnson, for defendants in error, urged that under the state of facts, claimed by plaintiffs, they cannot recover, unless proceedings in bankruptcy were commenced within two months after the alleged fraudulent sale; and further, that there was no evidence of fraud whatever, before the jury, and cited several sections from *Bump on Bankruptcy*.

By the Court, THOMAS, J.: An action was brought herein in the district court of Uinta county, by Orlando North and L. Newman, assignees in bankruptcy, etc., of Russell Thorp against Wm. McDonald and Harvey Booth, to recover the value of a large amount of horses, cattle, mules, and other personal property, alleged to have been sold by said bankrupt to the defendants, on the twenty-fifth day of September, A. D. 1874, in contravention of the provisions of the bankrupt law of the United States. The venue in said action was subsequently changed to Sweetwater county. The petition in bankruptcy, upon which said Thorp was ad-

judicated a bankrupt, was filed in the third district court, on the seventeenth day of December, 1874. The personal property herein referred to was sold to the defendants in the district court, for the sum of three thousand and five dollars, while, it was alleged in said plaintiff's petition, that said property so as aforesaid transferred was worth the sum of six thousand four hundred and fifty dollars.

The case came on for trial at the October, Sweetwater, term, 1875, before Chief Justice Fisher and a jury. After the testimony of the plaintiffs had closed, the defendants moved for a nonsuit, upon the ground that said testimony failed to show the existence of a cause of action in favor of the plaintiffs and against the defendants, which motion was, after the arguments of counsel, sustained by the court. A motion was subsequently made, by counsel for the plaintiffs, to set aside such nonsuit, which second-named motion was overruled, and judgment ordered for the defendants against the plaintiffs for costs. The only error now complained of in the court below, and to be passed upon by this court, is the granting of said motion for nonsuit.

It is apparent, from the reading of the petition of the plaintiffs in the district court, that it was drawn solely with reference to section 5129, of the revised statutes of the United States, and to the provisions therein contained, while the petition, together with the evidence adduced upon the trial, viz.: That the defendants herein, and the purchasers of the property mentioned, were creditors of the bankrupt Thorpe, brought the case before the district court, under the provisions of section 5128. The entire statutes concerning bankruptcy should certainly be considered together, so far as they may affect the questions involved in this case, and we cannot see that the provisions of section 5046 are at all in conflict with those of section 5129. One we find, with those sections of the law giving instructions and directions to assignees in bankruptcy; the other with those sections which define what properly should be seized for the

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benefit of creditors; or, in other words, section 5046 refers to the duties of assignees, while sections 5128 and 5129 describe more fully than in the general instructions just what contracts for the disposition of property were void, and what property was subject to the action of the assignee. We are of the opinion that section 5046 makes no new or different provisions from sections 5128 and 5129, but may be regarded as referring to them and to the provisions in those sections contained.

Under this view of the case as the proceedings before the district court came entirely within the provisions of section 5128, that court committed no error in sustaining the motion for nonsuit, for there was no evidence whatever adduced upon the trial to show that less than two months had elapsed between the alleged fraudulent sale and the filing of petition in bankruptcy; but, on the contrary, the testimony of the plaintiffs was conclusive on the point that more than two months had transpired between the occurrence of those two events. It is conceded that it is not merely discretionary with, but that it is the duty of a court to grant a nonsuit on motion of defendants where the plaintiff has failed to adduce any evidence to establish any allegation material to the issue. Upon this question of time therefore, it is clear that the court below, not only did not commit an error but acted strictly in accordance with the line of its duty in sustaining the motion for a nonsuit.

Even had this case not fallen under the provisions of section 5128, it is very questionable whether there was any evidence before the jury tending to prove a fraudulent transfer of property. The property was sold at a low price but not at as low a one as would be inferred from reading the plaintiff's petition, and there is no question but what the price named was actually paid by the defendant to said Thorpe. The transfer of a large amount of property in this country) where it is very difficult to obtain money in large quantities) at a single sale for cash by a person in em-

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barrassed financial circumstances, even at a low price, is not sufficient in itself to raise the presumption of fraud. But the first and principal question raised and discussed on the argument of the cause in this court is sufficient to decide it upon, and a further examination of the evidence is unnecessary.

The decision of the district court is affirmed.

BYRNE v. MYERS.

EVIDENCE, PREPONDERANCE OF.—It is the province of a jury, and of the court in the absence of a jury, to determine upon which side of the case the weight or preponderance of evidence is found; and it must be shown affirmatively by the plaintiff in error that the verdict was contrary to the evidence, or was not sustained by sufficient evidence, or was contrary to law, before this court may interfere.

ERROR to the Third District Court for Unita County.

A statement of the case is given in the opinion of the court.

H. Garbanati, for the plaintiff in error, cites: *Cherry v. City National Bank of Chicago*, Eighth Chicago Legal News; Rev. Stat. of Wyoming, 54; *Belcher v. Laig*, 8 Mich. 29; *Reynolds v. McCornie*, 5 Chicago Legal News, 218; Hilliard Rem. for Torts, 30; Hilliard on New Trials, 539.

W. W. Corlett, for defendants in error, cites: Laws of Wyoming, 72; Gra. & Wat. on N. T. 380, 405; *Tracy v. Sackett*, 1 Ohio St. 54; *Grazly v. Hunter*, 3 Id. 399; *Webb v. Protection Co.*, 6 Ohio, 456; 12 Id. 151; 6 Ohio St. 497; 12 Id. 428; *Stiles v. McKibben*, 2 Id. 588; *Administrators of Isaac Perrin v. Ins. Co.*, 11 Ohio, 147; *Lessees of Ludlow Heirs*, 4 Id. 44; *Reed v. McGrew*, 5 Id. 387.

By the Court, FISHER, C. J.: This was an action in replevin brought in the district court in and for the third

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judicial district, for the recovery of certain work oxen, alleged by plaintiff to be wrongfully detained by defendant. The plaintiff, to maintain his action, claimed to have bought the said cattle from one Thornton, then a resident of Utah, and produced on the trial a bill of sale conveying the right and title of the cattle to Myers, the plaintiff. When the case was called for trial, the plaintiff filed a motion for continuance, on the ground of an absent witness, in an affidavit filed in support of the motion for continuance, in which he set out at large that the absent witness, viz., Thornton, who had given plaintiff the said bill of sale, that he, Thornton, would swear, if present, that he had sold the said cattle to Myers, the plaintiff, and had given him a bill of sale, and that he had never sold the said cattle to Byrne, the defendant. The court granted a continuance on the showing made in the motion and affidavit, when the defendant, by his counsel, agreed to admit that Thornton, if present, would swear to the matters stated in the aforesaid affidavit. Whereupon, by consent of parties, a jury was waived and the case tried by the court, Thomas, J., presiding. The testimony being heard on behalf of plaintiff and defendant, the court found for the plaintiff, Myers, that he had the right of property, and to the immediate possession thereof at the time of the commencement of the action. Whereupon the defendant filed a motion for a new trial, upon the reasons filed, being the same as set out in his bill of exceptions in this court, and the case was brought here by petition in error.

The first exception complained of is, that the finding of the court in this case is against and contrary to the weight of evidence and law of the case; second, that the court erred in admitting as testimony on the part of the plaintiff the books of defendant, to prove an account between defendant and a party other than the plaintiff; third, that the defendant was surprised by the testimony of one C. N. White, a witness on the part of the plaintiff, and could not by any exercise of prudence have guarded against it, or by

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any probability have anticipated it; fourth, that the said defendant has, since the trial of this cause, discovered new and material evidence in this case, of which he was entirely ignorant until after the case was submitted to the court.

The court fails to discover, from the record in this case, any error of which the plaintiff in error has the slightest ground for complaint. It is not a ground of error, under the statutes of this territory, that a case is decided by either a court or jury against the supposed weight of evidence, from the fact that it is the province of a jury, and of the court in the absence of a jury, to determine upon which side of the case the weight or preponderance of evidence is found. Subdivision sixth of section 306 of the civil code, found on page 72 of the compiled statutes, provides that a new trial may be granted when the verdict, report or decision is not sustained by sufficient evidence and is contrary to law, and for the reason assigned in the first exception, but we think that an examination of the evidence set out in the record, by any unprejudiced mind, will very fully and satisfactorily show that this decision is very fully sustained by the evidence.

The second error complained of we think equally unfounded. Our statutes provide that the books of account and other records and papers may be brought into court for the purposes of justice, and we fail to discover any other purpose in their being exhibited on the trial of this case. They were the books of the defendant, and if they tended to any extent to contradict his oral statements, that was his misfortune and not the books.

The third exception is still more groundless, if possible. It sets up error on the ground of the surprise of defendant on account of the testimony of one of plaintiff's witnesses called in to rebut the statement of the defendant himself, while he was still in court and might have denied the statement of said witness, from whose testimony he alleges surprise, especially as in his affidavit filed he only claims to contradict the statement of plaintiff's witness by his own

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denial. The fourth exception is of the same character as the third. The record shows that the after-discovered testimony was the defendant himself—that is, the defendant below. In his affidavit for a new trial he alleges newly discovered evidence, which it was impossible for him to have at the trial, but when we come to see who and what the newly discovered evidence was we find it to be the defendant below himself. To set aside verdicts upon such a showing of errors would be making a mock of justice.

Judgment affirmed.

THE BOARD OF COUNTY COMMISSIONERS OF UNITA COUNTY *v.* HINTON.

PROCEEDINGS IN ERROR—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL.—The plaintiff in error must incorporate his motion for a new trial in the bill of exceptions, and thus have it made part of the record, otherwise the proceedings in error, on motion, will be dismissed, and the judgment of the lower court affirmed.

ERROR to the Third District Court for Unita County.

This case was brought to the supreme court by writ of error, but the bill of exceptions not containing the motion for a new trial, on motion of defendant in error the proceedings in the supreme court were dismissed, and the judgment of the district court affirmed.

William G. Tonn, for the motion.

H. Garbanati, opposed.

Argument for Appellee.

MOSHER *v.* THE HILLIARD FLUME AND LUMBER COMPANY.

PROCEEDINGS IN ERROR—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL.—The plaintiff in error must incorporate his motion for a new trial in the bill of exceptions, and thus have it made part of the record, otherwise the proceedings in error, on motion, will be dismissed, and the judgment of the lower court affirmed.

ERROR to the Third District Court for Uinta County.

This case was brought to the supreme court by writ of error, but the bill of exceptions not containing the motion for a new trial, on motion of defendant in error the proceedings in the supreme court were dismissed, and the judgment of the district court affirmed.

W. W. Corlett and William G. Tonn, for the motion.

H. Garbanati, opposed.

JUBB *v.* THORPE.

CHANCERY JURISDICTION.—Where the parties cannot have an adequate remedy at law, it is the special province of a court of equity to assist parties in carrying out the provisions of their contracts, when the same are unstained by fraud.

APPEAL from the Third District Court for Uinta County.

A sufficient statement of the case appears in the opinion of the court.

E. P. Johnson, for appellant, contended that the complainant had an ample remedy at law, and that her complaint should be dismissed, citing Story's Eq. Jur. sec. 1031; Id. secs. 1030, 1032; Id. sec. 49.

H. Garbanati, for appellee.

Opinion of the Court—Blair, J.

By the Court, BLAIR, J.: It appears from the record in the case that the complainant, Annie Jubb, on the fifteenth day of January, A. D. 1875, filed her amended bill of complaint against the defendant in the district court of Uinta county, setting forth substantially the following facts, viz: That the defendant, on or about the second day of May, 1874, being seised and possessed of two certain houses described in the bill, situate in the town of Evanston, in the county of Uinta, in the territory of Wyoming, applied to complainant for a loan of one thousand seven hundred and thirty-two dollars, the payment of the same to be secured by a mortgage on the property aforesaid.

The complainant charges that she loaned the defendant the sum aforesaid, and to secure the payment of the same took a mortgage on the property aforesaid; that only a part of the sum loaned the defendant had been paid to her, leaving a large balance, with the interest due thereon, still due and unpaid; that by some mistake there was but one witness to the execution of said mortgage, when there should have been two; that said mortgage provided, amongst other things, that in the event the said sum of money was not paid by the defendant when it became due and payable, "the said Annie Jubb shall have the right to take immediate possession of said property, and sell the same at public auction in manner provided by law." The bill then avers that there is no special manner provided by law to sell said property, in accordance with the terms of said mortgage. The complainant then prays that relief may be granted her in the premises; that the court will decree the property to be sold, her debt paid, and for general relief.

The defendant appeared and answered the bill of the complainant, and the plaintiff filed a replication to said answer. The court decreed the property sold, which was accordingly done, and the sale was confirmed. Thereupon the defendant appealed to this court.

The only question presented for the consideration of this court in the argument of counsel, was that of jurisdiction.

Argument for Defendant in Error.

While it may be said to be an almost inflexible rule, that a court of equity will not assume jurisdiction, when the party seeking relief has a full and adequate remedy at law; yet, when this is not the case, it is the special province of a court of equity to assist parties in carrying out their contracts when unstained by fraud: Bouv. Inst. vol. 2, 3910-12-13-15; *Evans v. Strode*, 11 Ohio, 480. In this case it is apparent that there is no adequate remedy at law, by means of which the clear and evident intention of the parties could be fully carried out. We are, therefore, of opinion that the court below rightfully assumed jurisdiction of the case; that the appeal should be dismissed and the decree and proceedings of the court below affirmed.

Appeal dismissed and decree affirmed.

NAGLE v. RUTLEDGE.

VERDICT—NEW TRIAL.—A verdict will not be set aside, nor a new trial ordered, if it is apparent that substantial justice has been rendered, especially if it is also evident that another jury would not materially vary the findings of the first.

ERROR to the First District Court for Laramie County.

A sufficient statement of the case will be found in the opinion of the Court.

W. W. Corlett, for the plaintiff in error, contended that the district court erred in not granting defendant's motion to compel the plaintiff, upon the trial, to elect upon which of the separate causes of action he would proceed to verdict, and cited: 1 Phill. on Ev. *854; *Pierce v. Pickens*, 16 Mass. 470; Willard's Eq. Jur. 92; 8 Graham & Waterman, 710 *et seq.*; *Pendleton St. R. R. Co. v. Statman*, 22 Ohio St. 1.

E. P. Johnson, for defendant in error, cited in opposition, 1 Chitty Pl. *340, *344; 1 Nash, 553, 361; Pom. on Rem.

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secs. 540-54; 17 N. Y. 227; 4 Cow. 564; 11 Wend. 584; 4 Wend. 285; 13 Wend. 276; 28 N. Y. 438; 3 Phill. Ev. *401, *411; 2 Greenl. sec. 104.

By the Court, THOMAS, J.: This was an action brought by the defendant in error, T. W. Rutledge, against the plaintiff in error, Erasmus Nagle, to recover the sum of seven thousand three hundred and forty-six dollars and nineteen cents for the work, labor, care and diligence of the said Rutledge, and for material furnished and provided for the erection of a building for said Nagle at his request, the plaintiff alleging that the amount named was due him January 1, 1873, and that the said services and materials were reasonably worth said sum.

The defendant answered: 1. By a general denial; 2. Payment; 3. A special contract under which the building in question was to be erected for the sum of five thousand five hundred and thirty dollars and payment of that amount; 4. A counter-claim for damages for non-performance of the contract in several particulars.

After trial before Chief Justice Fisher and a jury, a verdict was rendered in favor of the plaintiff for nine hundred and thirty-nine dollars and sixty-three cents. After a motion for a new trial had been made and refused, judgment was entered in accordance with said verdict, whereupon the case was brought by petition in error to this court. While six errors are assigned in the petition in error, but one was really argued or urged upon the hearing of the case. It appears from the evidence that a contract partly expressed and partly implied was entered into between the plaintiff and defendant for the construction of the building in question; that this contract was made very loosely, and was subsequently very materially modified by the consent of parties in the way of alterations, additions and extra work and quality of material. The petition containing but one count, the counsel for the defendant at the close of the plaintiff's testimony, which related to these alterations, ad-

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ditions, etc., moved the court to order said plaintiff to elect on which of the separate courses of action he would proceed to verdict. And the chief error assigned throughout is the permitting by the court of these alleged several causes of action going to the jury under the one count contained in plaintiff's petition. The court overruled the motion of the defendant, and we think properly for two reasons:

1. That the petition under our rules of practice as well settled by various decisions, was amply sufficient to cover and embrace the several items mentioned.

2. That the motion to elect was made too late, that is to say, after all the evidence had been introduced on behalf of the plaintiff. If it had merits at all it should have been introduced at a much earlier stage in the trial.

In reference to the first reason mentioned why said motion was properly overruled, it is proper to state that upon a careful examination of the entire record, we find that the items to which the greatest objection was made on the trial by the defense were either so far renounced, rejected or explained before the close of the trial that the jury could not have been misled by them in arriving at their verdict, and that those items which still remained very properly came under the general count, for they were not entire and separate counts, but matters merely growing out of and connected with the principal contract and were part thereof, as bearing the same relation thereto that branches do to a tree, growing and arising out of and forming and composing a portion of the same.

But, further, we consider the practice as settled in this territory that in actions of the nature of the one under consideration the general count as the one contained in the plaintiff's petition herein is sufficient to allow the proof of several items of a bill. We do not consider it necessary that there should be a separate count for each item where they are connected so intimately with the principal subject-matter as they are in this case. We do not know that this question of practice has been previously decided in this

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court; but it has been in several instances in the various district courts of this territory. We are further of the opinion from the examination of the record in this case:

1. That manifest and material judgment has been rendered by the judgment of the district court herein.

2. That even if such justice had not been strictly rendered that it is exceedingly doubtful to say the least, whether if a new trial were granted a different verdict and judgment, or one more nearly setting the rights of the parties herein justly and equitably, could be obtained.

3. That in this instance the general presumption in favor of verdicts and judgments should be given full weight.

As the other errors assigned were neither expressly urged nor fully argued, we do not deem it necessary further to refer to them, except to state that upon due examination of them we do not find in them any error that would justify this court in modifying or reversing the judgment of the district court.

Such judgment is affirmed and *writ of procedendo* ordered.

FREEMAN v. CROUT.

EJECTMENT.—Under the statutes of Wyoming territory it is not necessary that the plaintiff is the owner of the real estate in question in fee-simple absolute. It is sufficient if he is entitled to the legal or equitable estate therein.

EVIDENCE.—A deed or conveyance executed in another territory or state according to the laws of that territory or state, of lands in Wyoming, is executed according to the laws of Wyoming, if pertinent and relevant, should be admitted in evidence, and it is error for the court to refuse testimony tending to prove what the law is in reference thereto in such other state or territory.

ERROR to the Second District Court for Albany County.

A sufficient statement of this case will be found in the opinion of the court.

Opinion of the Court—Thomas, J.

J. W. Kingman, for plaintiff in error, cited : *Laws of Nebraska*, 872 ; 4 *Kent*, 447 ; 18 *How.* 56 ; 9 *Cush.* 475 ; 6 *Met.* 439.

Brown & Brockway, for the defendant in error, cited : 3 *Wash. on Rl. Property*, 249, 250 ; 1 *Par. on Con.* 139, 140 ; *Angel & Ames*, 190, 192 ; 36 *Vt.* 452 ; *Redfield R. R. Cases*, 539 ; *Tyler on Eject.* 541, 542 ; 9 *Cal.* 1 ; 52 *Ill.* 49, 219.

By the Court, THOMAS, J. (BLAIR, J., dissenting) : This action was brought to recover the possession of certain real estate in Laramie city, Albany county, and territory of Wyoming. The plaintiff (being the present plaintiff in error) in his petition, alleges the legal title thereto in himself, and that the defendant, on the fourteenth day of October, A. D. 1870, entered upon the aforesaid premises, and has ever since unlawfully kept him, the said plaintiff, out of the possession thereof. In the second count of said petition the plaintiff claims damages in the sum of three thousand dollars by reason of such entry and detainer. The plaintiff claimed title and right of possession from the United States, through the Union Pacific Railroad Company and one Fred. W. Freeman. The district court admitted in evidence the patent from the United States to said company conveying the premises in question, and also the quitclaim deed from said Fred. W. Freeman to the plaintiff, but refused to admit an instrument purporting to be a deed or conveyance from the Union Pacific Railroad Company to said Fred. W. Freeman, which refusal, together with the charge of the court to the jury upon that subject, form the principal errors assigned by the plaintiff. Upon the trial of the cause the plaintiff adduced evidence tending to prove the occupancy, possession and rights of his grantor. The two deeds in question bear date as follows : the one to Fred. W. Freeman from the railroad company, May 7, A. D. 1869, and the one from Fred. W. Freeman to the plaintiff, December 28, A. D. 1869.

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The defendant introduced no evidence. Judgment was rendered, in accordance with the verdict of the jury, for the defendant.

As already stated, the chief errors assigned are the ruling out of the court below of the instrument purporting to be a deed from the Union Pacific Railroad Company to Fred. W. Freeman and the charge of the court in reference thereto. Two other questions of considerable importance appear to have been raised in the court below, but one of them is not mentioned in the assignment of errors, and the other, while contained in such assignment, is not otherwise referred to in the record, and consequently cannot be considered at this time.

Before proceeding further it will be well to refer to several portions of the statutes of the territory which have a bearing upon this case. Section 557 of the code provides, "in an action for the recovery of real property it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same as required by section 123, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." Section 558 reads, "it shall be sufficient in such action if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession, as the case may be; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted * * * * ." It will be seen by section 557 that the plaintiff in an action of this nature, in order to recover is not compelled to show that he is the owner of the premises in fee-simple absolute, but simply that he has a legal or equitable estate therein. Hence the answer in this case is not the general denial provided for in section 558, and is consequently insufficient. It is further provided in section 7, chapter 3, Laws of Wyoming, that "no grant or conveyance of lands, or interest therein, shall be void for the reason that at the time of the execu-

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tion thereof such land shall be in the actual possession of another claiming adversely," which provisions are in contravention of the law and decisions of many states, and effectually do away with the old rules. We also find in section 3 of the same chapter the following, "a deed of quitclaim and release shall be sufficient to pass all the estate which the grantor would lawfully convey by deed of bargain and sale," which section certainly establishes the law as we have always understood it, the contrary, however, having sometimes been asserted in the territory, though probably without any reference to the section cited.

In cases of this nature it has been held sufficient in this territory, and such has been the practice, for the plaintiff to show the possession of his grantor, and then to introduce the deed to himself, consequently it will not be disputed:

1. That the deed from Fred. W. Freeman to plaintiff conveyed to said plaintiff all the right, title and interest of the said Fred. W. Freeman.

2. That if said Fred. W. Freeman was in possession of said premises at the time of the execution of said last-mentioned deed, whether such possession was actual, legal or constructive, then the deed from Fred. W. Freeman to plaintiff is sufficient to establish for him a *prima facie* case.

I am aware that it is urged by defendant's counsel that Fred. W. Freeman was not then in possession, and that the plaintiff states upon his cross-examination that said Fred. W. Freeman was not in possession at that time, as he had gone east to get married. But what are we to understand in this case, after duly considering all the circumstances, by the term "possession?" The evidence shows that Fred. W. Freeman was in actual possession at a time only shortly prior thereto. We have seen that the two deeds mentioned were executed some months prior to the entry and detainer on the part of the defendant Wm. Crout, and it is nowhere shown that, at the time the deed last mentioned was executed, there was any adverse possession to Fred W. Freeman whatever. Passing upon all

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these facts, it would not be very difficult to draw the inference that, upon the twenty-eighth day of December, A. D. 1869, Fred. W. Freeman, though not in the actual, was in the legal possession of the premises in dispute. A man may be in Europe, and yet have legal valid possession of real estate in Wyoming territory. In our opinion, the question of possession should have been more fully left to the jury after it had been by the court specifically instructed as to what constitutes legal possession. Had the jury then found for plaintiff, the instrument purporting to be a deed from the U. P. R. R. would not have been as material.

The precise objections to the introduction of this instrument do not appear so clearly from the record as from the arguments of counsel. We understand them to be:

1. That the same is not executed according to the laws of this territory;

2. That it has not affixed to it the corporate seal of the railroad company;

3. That it does not contain the signature of said corporation, but only that of G. M. Dodge, agent and trustee;

And, 4. That the instrument itself is not sufficient in law.

Our statutes, p. 5, sec. 8, laws of 1875, provide how such instruments shall be executed, acknowledged, etc., when done within the territory. While section 9, on page 6, provides what shall be necessary where the deed or mortgage is executed in some other state or territory. And upon a careful examination of the certificate, affixed to the alleged conveyance from the U. P. R. R. to Fred. W. Freeman, we find that it strictly complies with the statutes in such case made and provided, *prima facie*, therefore the deed is correct and duly executed. And it is to be remembered that no evidence whatever, by way of contradiction, rebuttal or otherwise, was introduced upon the trial on the part of the defense. Of course, the instrument would be irregular and defective, but for the provisions of sec. 9, p. 6, laws of 1875. But with those provisions and the certificate attached, I am of the opinion that the first

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and second objections to the introduction of the instrument are fully obviated.

As to the third objection, I think that the signature to the instrument is defective, but I am not certain that the defect cannot be cured by testimony upon that point. Such testimony, or testimony bearing upon the question, was offered by the plaintiff and ruled out by the court, viz., the resolution of the directors. As far as appears from the records, that resolution should have been admitted in evidence. It is not, however, fully set forth in the record, and thus we are unable to say but that there may have been sufficient grounds for rejecting it. But from the record, which is our guide, there does not appear to have been. But, whether such defect could have been cured or not, we still find the certificate, in due form, of the proper officer attached, according to our statutes, to the effect that said instrument was duly executed, according to the laws of the state in which it was so executed, viz., Nebraska, which certificate remains unimpeached. And we are of the opinion that, while this instrument in its present form may not be sufficient to convey a fee, it may be to convey "a right of possession," and with proper proof a legal estate.

The fourth, as well as the third objection, is referred to in the foregoing; the deed is in due form, otherwise than is stated above, and as to its validity, it makes no difference in this instance whether the consideration was one dollar or one thousand dollars. It was an error to overrule the admission of this instrument. It affected the substantial rights of parties. It should have been admitted for the jury to pass upon under the proper instructions of the court.

The judgment of the district court is reversed and a new trial ordered.

Argument for Complainant.

WILD v. STEPHENS ET AL.

MORTGAGE—FORECLOSURE—SUBSEQUENT INCUMBRANCERS.—While the mortgagor, in an action of foreclosure, may, if he desires, plead the statute of limitations, it is a personal privilege, and does not pass to subsequent incumbrancers.

IDEM.—Although the note for which a mortgage is given as security upon real estate may be barred by the statute of limitations, yet if such mortgage is not likewise barred, the mortgagee still retains sufficient equitable interest therein to enable him to foreclose the same.

APPEAL from the First District Court for Laramie County.

A full statement of the case will be found in the following opinions.

D. McLaughlin, for complainant and appellee, contended :

I. That the laws of Wyoming postpone an unrecorded conveyance only as against a subsequent purchaser or incumbrancer in good faith for a valuable consideration, citing: 4 Kent's Com. 165-178; *Id.* 456-459; *Dickenson v. Tillinghast*, 4 Paige, 215.

II. That defendants, appellants, could not appear in this cause to plead the statute of limitations, and citing: Angell on Lim. 449; 4 Kent's Com. 136, 154; 2 Blackstone, 157; *Bank of Metropolis v. Gultslick*, 14 Pet. 19; *Lord v. Morris*, 18 Cal. 488; Wyoming Code, 1869, 509.

III. That though the notes be barred, the lien of the mortgage remains good, citing: *Sparks v. Pico*, 1 McAllister; U. S. Cir. Court R. 479; *Longworth v. Taylor*, 2 Superior Court (Ohio), 39; *Almy v. Wilber*, 2 Woodb. & M. 371; *Thayer v. Mann*, 19 Pick. 535.

IV. That judgments are liens upon the legal estate of judgment debtors, and not upon their equitable interests, citing: *Jackman v. Halleck*, 1 Ohio, 318; *Douglas v. Houston*, 6 Id. 156; *Barr v. Hatch*, 3 Id. 527; *Roads v. Symmes*,

Argument for Appellants.

1 Id. 281; Laws of Dakota, 1867-8, 232; *Bachman v. Sepulveda*, 29 Cal. 688; Laws of Wyoming, 1869, 707; Freeman on Judgments, secs. 407, 409; 1 Greenl. on Ev. secs. 501, 503.

V. That the assignment of a note secured by mortgage transfers all the rights secured by the mortgage, citing: *Pain v. French*, 4 Ohio, 318; 8 Id. 222; 1 Johns. 509; 5 Cowen, 203; 4 Id. 43; 9 Wend. 80; 13 Barb. 203; 23 Id. 461.

E. P. Johnson and *W. W. Corlett*, for appellants, contended that:

I. The decree declares that the judgments of Stephens and Babcock & Co., are not liens upon the property described in the mortgage, whereas the statute expressly declares a judgment to be a lien on real estate from the first day of the term at which it was rendered, and not later than the date of rendition: Laws of 1869, sec. 446, p. 594. And in absence of statutory provisions, it would be a lien at common law: Freeman on Judgts. sec. 339. The judgments being liens subject only to the prior lien of the mortgage, the judgment creditors became subsequent incumbrancers, and were properly parties in the foreclosure suit. It was, however, held by the court below, that the judgments were not liens on the interest of the mortgagor, as his interest was simply an equitable one; such holding was, however, directly in the face of all authority of any pretension to respectability on that subject. Equity has always considered a mortgage simply a security, a chattel interest: Story on Eq. Jur. secs. 1013-1017; 2 Wash. Real Prop. 96, 151; *Carpenter v. Logan*, 16 Wallace, 271; 4 Kent, *158-162; *Phelps v. Butler*, 2 Ohio, 223; *Ely v. McGuire*, Id. 223; *Hitchcock v. Harrington*, 6 Johns. 290; *Jackson v. Willard*, 4 Johns. 41; *Eaton v. Whitney*, 3 Pick. 484; 2 Blackstone, book 3, *435; *Elyster v. Goff*, U. S. Sup. Court Legal News, Feb. 20, 1876; 2 Wash. on Real Prop. *546.

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II. Appellants, being subsequent incumbrancers and parties to the bill, had a right to set up the defense of the statute of limitations in bar of complainant's claim. The defense, though in general a personal privilege, may be set up by any one interested in the claim to which it is interposed: *Angel on Lim.* 289, 301, 302; *Forel v. Langee*, 4 Ohio St. 464; *Lord v. Morris*, 18 Cal. 482. That courts of equity are governed by the law limiting actions equally with courts of law: *Angel on Lim.* 20-24.

III. The court below erred in finding that there was any sum due complainant on the notes. There is no covenant in the mortgage for the payment of money. The only obligation in that direction recognized in the mortgage, is that arising on the notes therein recited, and which the mortgage is given to secure. The notes sued on were given June 1, 1869. At that time the laws of Dakota were in force here, but they were repealed January 1, 1870: *Laws of 1869*, 707. The limitation law of 1869 required action to be commenced within five years after cause therefor accrued: *Laws of Wyoming, 1869*, 510. The code of 1869 is the code in force for the purposes of this action: *Laws of 1873*, sec. 710, page 163. This bill was filed May 28, 1875. There had been no payments made on the notes of principal or interest, and action thereon was fully barred a long time prior to the commencement of the action. The court, therefore, erred in its findings and decree. Defendant's cross-bill should have been dismissed, but the prayer thereof granted, and plaintiff's bill dismissed.

By the Court, FISHER, C. J.: This was an action in chancery, brought to this court from Laramie county at March term, A. D. 1876. The record in this case shows that on the first day of June, A. D. 1869, at Cheyenne, Laramie county, Wyoming territory, Isaac W. French, defendant in this action, made and delivered to one Henry J. Rogers three promissory notes, amounting in the aggregate to the sum of three thousand six hundred and ten dollars and seventy-four

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cents ; two of them payable in sixty and ninety days and one at four months from the date thereof.

On the second day of June, A. D. 1869, the said French executed and delivered to the said Rogers a mortgage on certain lots in the city of Cheyenne to secure the payment of said notes. This mortgage was recorded in the records of Laramie county on the second day of April, A. D. 1870.

On the eighth day of November, A. D. 1869, John Stephens commenced a suit in the district court in and for Laramie county, in said territory, against Virginia G. Adams, Helen Green and Isaac W. French, partners as Adams, Green & Co., and Gilbert Adams. On the thirtieth day of April, A. D. 1870, a judgment was entered against defendants and in favor of said plaintiff for the sum of five hundred and sixty-eight dollars and five cents.

On the eighth of August, A. D. 1871, at the July term of the district court, in and for Laramie county, Francis M. Babcock and John Babcock, partners as Babcock & Co., recovered a judgment against Virginia Adams, Helen M. Green and Isaac W. French, late partners as Adams, Green & Co., and Gilbert Adams. The record states that on the day above named came the parties, and by agreement the cause is tried by the court, and a judgment was rendered against defendants, and in favor of plaintiffs, for the sum of four thousand one hundred and fifty-eight dollars and twenty-seven cents. The record fails to show how jurisdiction was obtained, but states that a trial was had by the agreement of parties.

It will be observed the singular mixture of the names of the parties. The Babcock firm, who recovered judgment against Adams, Green & Co., is shown by the record to be composed of Francis M. Babcock and John Babcock, whilst the firm contesting in this action is composed of Thomas W. Babcock and John Babcock. This discrepancy of names is sufficient, in my judgment, to dismiss them as parties in the future consideration of this case, and I shall, therefore, confine myself to a discussion of the relations existing between

John Stephens and the estate of Isaac W. French and J. E. Wild.

The appellants, upon the argument in this court abandoned every objection which they had set up against the proceedings in the district court, except the plea of the statute of limitations. They claim that inasmuch as more than five years had elapsed from the date of the notes given by French to Rogers before suit was brought on them, that the statute, if pleaded, would become a bar to a recovery upon them, and that a failure to bring a suit on the notes, or to institute proceedings to foreclose the mortgage, it would only be necessary to plead the statute to defeat a recovery on either the notes or on the mortgage, because they allege that the statute runs against the mortgage as well as against the notes. And that the judgment creditors had such an interest as would justify and empower the judgment creditors to plead the statute in bar of the rights of the mortgagee to recover.

From the above statement in this case I am relieved from the duty of any extended labor in disposing of the questions raised, and will content myself with saying that, in my opinion, no matter whether the statute might be pleaded against a recovery on the notes or not, the mortgagee certainly has an equitable right to recover on his mortgage, and I am supported in this view by ample authority, the case of *Sparks v. Pico*, found in 1 McAllister C. C. Rep. 479, cited in Angell on Lim. 87, note 5, where this language is used: "But if action was barred by the statute of limitations, nevertheless the foreclosure of the mortgage may be proceeded with, at any time within the period of twenty years, by suit in equity."

The same doctrine is held in the case of *Longworth v. Taylor*, 2 Superior Court of Ohio, cited in Seney's Code, 13, note 49. This is the universal doctrine, unless it is differently provided for by statute. So that I have no doubt as to the right of the mortgagee to foreclose, notwithstanding the fact that the notes are barred, should the statute be plead-

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ed. The statute of limitations, however, is a personal privilege, but is only a privilege, and a debtor is not compelled to set it up, even though the notes may have run for twenty years, and even though that privilege attaches to the mortgage as well as to the notes, and while the mortgagor, in that case, has the right to plead the statute, if he fails to do so the mortgagee and payee of the notes may proceed to foreclose or collect by suit on the notes.

A subsequent judgment creditor undoubtedly has the right to plead the statute of limitation so as to defeat a prior incumbrance, if he is placed in a position to do so. But before he can set up such a plea he must occupy a position freed from all doubt on the question. How then do the parties to this action stand? I pass over the judgment obtained by Francis M. Babcock and John Babcock, partners as Babcock & Co., because I find that they are not contestants, but find that Thomas W. Babcock and John Babcock have some how got their names before this court. I therefore dismiss them and proceed to show that John Stephens is not in a position to plead the statute of limitations. John Stephens recovered a judgment against Adams, Green & Co., and it is admitted that Isaac W. French was a member of that firm. But before Stephens can interfere with the individual interests of French as a member of the firm, he must show affirmatively that he has exhausted his remedy against the firm. And after he has done so, section 833 of the code of civil procedure of 1869 of Wyoming Territory provides that: "If the plaintiff in any judgment rendered against any company or partnership shall seek to charge the individual property of persons composing the firm, it shall be lawful for him to file a bill in chancery against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and have a decree for the debt and an award of execution against all such persons or any of them as may appear to have been members of such company, association or firm.

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Now if it is lawful for the judgment creditor to proceed in the way pointed out by this section, surely it is unlawful for him to proceed against the individual members of a firm in any other way. Mr. Stephens having failed to pursue his remedy in the way provided by law, I think his relation to the decree of Wild in foreclosing the mortgage is too remote to give him any standing in this court.

The proceedings in the court below are affirmed.

By THOMAS, J., dissenting. Appeal by John Stephens and Babcock & Co. from a decree entered in the first district court in favor of complainant at the May term, 1875. The defendants, French, Rogers and Nuckolls do not join in the appeal.

A bill in chancery was filed by said complainant to foreclose a mortgage executed by French in 1869 to secure the payment of certain notes therein named. French made default; but the defendants, John Stephens and Babcock & Co., having obtained judgments against French, subsequent to the execution of the mortgage, made defense as subsequent incumbrancers by setting up the statute of limitations, with alleged defects in the mortgage and its record, and by cross-bill prayed affirmative relief, viz: the cancellation of the mortgage and a decree of priority for their liens over that of the mortgage. Upon the argument of the cause in this court the only question referred to by counsel was the effect of the statute of limitations and the right of the appellants to plead the same, but the questions as to the alleged error in the mortgage and otherwise were raised in the briefs submitted. An amended complaint was filed by the plaintiff making the appellants herein additional defendants. It is claimed by the appellees that this was done upon the application of the appellants; but nothing is found in the case before us to show it. It appears by the records of the district court to which reference is made in the record in question, that executions have been issued

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upon the judgments obtained by the appellants and returned wholly unsatisfied.

I believe that from an examination of said record that the decision of the district court should be reversed upon at least two very material points. The first is, that the statutes of this territory settle for us the law of limitations of actions, and consequently a very large number of authorities cited, which might be applicable elsewhere, are not pertinent to this case. The laws of Wyoming, for the year 1869 (see p. 510, sec. 19), under the head of limitations, read as follows: "Within five years; an action upon a specialty, or any agreement, contract or promise in writing, or on a foreign judgment."

It will be seen that this differs materially from the statutes of most states, which provide that an action may be brought upon an instrument under seal within twenty or twenty-one years; while the legislature of this territory for 1873 materially changed and modified our statute of limitations; that act contains a broad saving clause to the effect that it shall not apply to notes and instruments previously executed. Consequently, the statement in the brief of the appellee, that this case comes within the provisions of the act of 1873, is incorrect, for it does fall within the provisions of the act of 1869, hereinbefore quoted. It therefore seems unnecessary to consider the question upon which the appellee placed very great importance in his brief and upon the argument—that is, whether a mortgage, being an instrument under seal, executed to secure the payment of certain notes, can be foreclosed when the notes to secure which it was given are conceded to be barred under said statute, if the statute is plead to such foreclosure. Although this is extensively discussed in the opinion of the majority of the court, I am of the opinion that it is entirely irrelevant, as the statutes before referred to say in effect that an action either upon a note or a mortgage, being even under seal, shall be commenced within five years, etc. From the provisions of the law of 1873, this is certainly the rule that

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governs in this case, and both the notes given and the mortgage in issue are barred by the statute.

Are the appellants, as judgment creditors of I. W. French, entitled to plead the statute of limitations? It is urged by the appellee that they are not:

1. For the reason that at the time of recovering the judgments, Wild, and not French, was the legal owner of the real estate mentioned, and that said judgments were not a lien upon it, as French then was the owner only of the equity of redemption;

2. That they were not personal judgments against French;

3. That the appellants should have at least exhausted their remedies against the copartnership property of Adams, Green & Co., before proceeding against the individual property of French.

I am of the opinion that the laws of the territory (see laws of 1869, p. 594, sec. 446), furnish a complete answer to the first objection, and if not, that the rules of common law are: See Freeman on Judgts. sec. 339, and many other authorities cited in the briefs of appellant.

In reference to the second, it appears, from the records of the two judgments, that French was personally sued and personally served, consequently those judgments would be good against his individual property, as well as against the property of the copartnership.

As to the last objection, the records, before referred to, show that executions have been issued in more than one instance against the copartnership property of Adams, Green & Co., and returned wholly unsatisfied, but I am of the opinion that even this was not required; that the judgments were personal judgments against said I. W. French, as before stated; and that it was not incumbent upon the appellants to show that they had exhausted any remedies against the copartnership property.

I am unable to see that section 833, of the code of civil procedure, as cited in the opinion of this court, has any bearing upon this case whatever, and should be considered

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only in reference to section 830. Further, the appellants, being subsequent incumbrancers, had undoubtedly the right to plead the statute as against the complainant: See *Angel on Limitations*, pp. 280, 301 and 302, under notes 1, 2 and 4 respectively; also 4 Ohio St. 464; and 18 Cal. 482. But the most complete answer to these various objections is the fact that the pleadings herein, taken together, fully admit the rights of the appellants, as claimed by themselves. The complainant voluntarily sets them up in his bill. These defendants do likewise in their answer. No denial whatever, is made, and no issue raised thereupon whatever. It further appears to me that in the examination of these pleadings, we find a full answer to the objection contained in the opinion filed in this court, as to the misnomer of certain parties appellants mentioned in the *Babcock* judgment. The error, if any there be, was made by the complainant, and under the general rules he should not be entitled to receive any benefit therefrom.

In concluding the case in the district court, and upon appeal from said court, the title first set forth in the complainant's bill of complaint has simply been followed, and no exceptions whatever were taken thereto. I cannot agree with another portion of that opinion, where it states that the record does not show how the court obtained jurisdiction, but adds that the parties were present, appeared in court and agreed to proceed with the trial of the cause. Appearance in open court and consent by all parties to proceed to trial, should certainly confer jurisdiction.

The bill of the complainant should have been dismissed, and the prayer contained in the cross-bill granted.

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FEIN v. THE TERRITORY OF WYOMING.

INDICTMENT—TERMS USED.—Under an indictment for willfully, maliciously, etc., killing a horse: *Held*, that testimony tending to prove the killing of a gelding was properly admitted.

CHARGE OF THE COURT.—Malice may be presumed against the defendant on trial in a criminal action to such an extent that it will, under certain circumstances, shift the burden of proof from the prosecution to the defense upon that particular question.

ERROR to the Second District Court for Albany County.

A full statement of the case is contained in the opinion of the court.

Brown and Brockway, for the plaintiff in error, cited: Revised Stat. 278; Bishop Stat. Crim. 248; 33 Texas R. 342; 1 Greenl. on Ev. 461; *Squires v. The Village of Neenah*, 24 Wis. 493; 1 Bish. Crim. Pro. secs. 1056, 1058; *State v. Enslow*, 10 Iowa, 115; 7 U. S. Dig. 400.

C. W. Bramel, for defendant in error, cited: Revised Stat. 278; *People v. Moody*, 5 Park, C. R. 568; 20 U. S. Dig. 385; 23 Id. 39; 1 Bish. Crim. Pro. 690-4; 1 Bish. Crim. Law, 437; 1 Archibald's Crim. Pr. 850; 1 Bouvier, 590.

By the Court, FISHER, C. J.: This was an action brought to this court by writ of error from Albany county, second judicial district. The facts are, that at the August term of the district court in and for Albany county, John J. Fein was indicted for "unlawfully, wantonly and maliciously" killing one horse, the property of one Patrick Doran.

The case was tried and the defendant found guilty as charged. A motion was filed for a new trial, which, after argument, was overruled, and the case brought here for review. The plaintiff in error assigns the following errors to the rulings of the court below:

1. That the court below erred in refusing to quash the said indictment, and in overruling the motion to quash said indictment made by defendant.

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2. That the said court erred, on the trial of the cause, in admitting the evidence of Patrick Doran and N. K. Boswell and other witnesses for the prosecution, to which the said John J. Fein (now plaintiff in error) objected.

3. That said court erred, in the trial of said cause, in refusing, on motion of defendant, (now plaintiff in error,) to strike out all evidence before this time gone to the jury in this cause tending to show the animal killed to be a "horse," it having now been shown by the evidence of prosecuting witness, P. Doran, that the said animal referred to in the indictment as having been killed by defendant to have been, at the time of killing, a "gelding."

4. That the court erred, in the trial of this cause, in admitting the evidence of P. Doran, N. K. Boswell, Mrs. Kean, and others, witnesses for prosecution, over objections of defendant, as to the killing and condition of a gelding, when the indictment charges, if anything, the killing of a "horse."

5. That the court erred, in the trial of this cause, in refusing to charge the jury, at the close of the evidence for the prosecution, as requested by defendant, to return a verdict, then and there, of "not guilty," on the ground that there was no evidence before the jury tending to criminate the defendant or to sustain the indictment.

6. The court erred, in the trial of this cause, in refusing to admit the testimony and evidence of Barbara Fein, a witness regularly sworn for the defense, and in refusing to permit the said Barbara Fein to testify in said cause, after she had been sworn regularly as a witness for defense and regularly called to the stand as such witness to testify on behalf of defendant.

7. That the court erred, in the trial of this cause, in charging the jury: "the jury may infer malice, unless the defendant proves the contrary to their satisfaction."

8. That the court erred, in the trial of this cause, in charging the jury: "should you find that the defendant intentionally shot and killed the horse in question, knowing

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it to be Doran's horse, it shifts the burden of proof to the side of defendant."

9. That the court erred, in the trial of this cause, in failing and refusing to charge the jury the law applicable to the case, as it is the duty of the court to do, under the laws of this territory.

10. That the court erred, in the trial of this cause, in this, to wit, that the said judgment was given for the territory of Wyoming, and against this defendant, John J. Fein, (now plaintiff in error,) when it ought to have been given in favor of said defendant, according to the law of the land.

11. That the court erred in the trial of this cause in refusing defendant's motion for a new trial, and in overruling defendant's motion for a new trial.

12. That the court erred in the trial of this cause, in this, to wit, that the said judgment was given for the territory of Wyoming and against the defendant, John J. Fein, now plaintiff in error, when it ought to have been given in favor of said defendant, according to the law of the land.

The first error complained of is the failure of the court to quash the indictment for several reasons set forth in the record, that it is ambiguous and that it is not indorsed by the prosecuting witness, that it does not properly describe the wounds, nor the manner in which they were inflicted, etc. With regard to the ambiguity of the indictment, we fail to discover wherein it consists; the want of indorsement by the prosecuting witness is of such a novel character that it is enough to say that we know of no law, either common, statutory, natural or divine, that requires any such thing to be done by such prosecutor. It is true that the criminal procedure law of this territory provides that the name of the prosecuting witness should be indorsed on the back of every indictment for a misdemeanor, but as no such error as to the want of such an indorsement is complained of, we content ourselves by simply remarking the matter complained of does not constitute error. The other matters complained of under the first alleged error are deserving of

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but little attention, inasmuch as the indictment clearly charges that the defendant, on the day named, at the county, etc., did unlawfully, wantonly and maliciously kill and destroy a certain horse, of the value, etc., the property of Patrick Doran, by shooting said horse in the side, and by reason whereof the said horse died. Now it is true that the indictment does not say whether the said defendant used a cannon, rifle, shot-gun or pistol, but it does say that he shot the said horse so that he died from the said wound, and we think there is no such ambiguity in the charge as the defendant can complain of, especially under the provisions of our statute found in the compiled laws of Wyoming, sec. 84, p. 149, where, after enumerating many things which may be omitted or added to an indictment, making the omissions or additions much fuller or broader than is complained of here, concludes with these significant words: "Nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." This and the previous parts of the section completely cover the defects complained of, even if any such defects existed, which we clearly think do not.

The second error complained of is so indefinite that we do not see how to pass upon it. It merely states that the court below erred in admitting the testimony of the witnesses, without stating any reason, so that we are left to presume that the only reason why the testimony is complained of is that stated in the first objection; if so, then it is answered above.

The third objection relied upon by the plaintiff in error, as the sheet-anchor of their case, viz., that the animal killed, being described in the indictment as a "horse," is shown by the evidence to have been a "gelding." The counsel for the plaintiff in error cite in favor of such a distinction a case decided in Texas, and found in 31 Texas, pp. 571, 572. This case fully supports the theory that where

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under a statute similar to ours, the defendant was indicted for the larceny of a "horse," and the proof showing that the animal stolen was a "gelding," it was held that the evidence did not sustain the indictment, but this is the only case we have been able to find supporting this view. It is true that at an early day this doctrine was held in England; but as early as 1838 the majority of the judges held that an indictment charging one with the larceny of a sheep, under a similar statute, without stating the sex, and the proof showing it to have been a "ewe," the defendant was rightly convicted, and this doctrine has been fully sustained ever since, because sheep, being a generic term, covers all the different species of the sheep family; so "horse," being a generic term, embraces the whole horse family: See Bishop's Statutory Crimes, secs. 247, 248 *et seq.* This, taken in connection with sec. 84 of the Criminal Code of this territory, satisfies us that there is no such error shown as would justify us in setting aside the verdict for the reasons stated.

The fourth error complained of has been disposed of in considering the second and third.

The fifth error complained of is, that the court erred in not instructing the jury that there was no evidence to convict the defendant, and that the jury should return a verdict of not guilty. Surely this objection cannot seriously be contended for. And the court, we think, only discharged its duty when it submitted the case to the jury to pass upon the facts as proven, and return such a verdict as they were justified in doing from the facts proven.

The sixth error complained of is, that the court refused to permit Barbara Fein, wife of the defendant, to give her evidence for the defense, after she had been sworn to testify. Neither at common law, nor under the statutes of this territory, can a wife or husband be a witness for or against each other, except in certain specified cases, and there is no one of such cases covered by the matters in issue in this case, but the complaint here is that the wife having been sworn without any objection having been interposed, that

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then she had a right to testify. We do not think that the mere fact that Mrs. Fein was sworn (it may be without the knowledge of the court) gave her any more right to testify than she would have had if the objection had been made when the oath was about to be administered to her; it is not the swearing of a witness that gives her or him a right to testify, but the relation which the witness holds to the parties to the action. And while it is all right to make the objection when the witness is called to be sworn, yet no right to object is forfeited by withholding the objection until the witness is put upon the stand; hence, in this objection we can discover no error.

The seventh objection is to the charge of the court. "That the jury may infer malice, unless the defendant proves the contrary to their satisfaction." This, it must be admitted, is stating the case quite strongly, but it is nevertheless in accordance with the weight of authorities. Mr. Russell, in his elaborate work on crimes, vol. 1, page 483, lays down the law to be that, whenever the crime is clearly proven, sufficiently to imply malice, unless there be something to rebut such an inference, immediately connected with the commission of the crime, that the burden shifts to the defendant to rebut such an implication. It is true that a contrary doctrine has been held in some cases, but we find that to be the views of the courts of Massachusetts and most of the other states, and it has been the rule in this territory ever since its formation.

There is nothing in the other exceptions which has not been passed upon in the examination of the foregoing, and it is therefore unnecessary to refer more fully to them. We come to the conclusion that if there was any error, such as would entitle the defendant to any action by this court, it is to be found in the fact that the jury found their verdict upon what might be regarded as not very conclusive evidence, but they being the exclusive judges of the evidence, we are not disposed to trench upon their prerogative, and hence the judgment of the court below is affirmed.

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MCCARTENEY v. WYOMING NATIONAL BANK.

STRANGER TO CONTRACT.—It is well settled that in no case can a stranger to a contract maintain an action upon it or for the breach of it, save in the exceptional cases where a promisee was considered merely the agent of the stranger, and where the stranger was regarded as the trustee of the party to whom the promise is made.

ERROR to the Second District Court for Albany County.

A sufficient statement of the case is contained in the opinion of Judge BLAIR.

Brown and Brockway, for the plaintiffs in error, cited: 12 Ohio St. 273; 1 Pars. on Con. 466-7; 37 N. Y. 575; 2 Greenl. on Ev. 90; *Putney v. Farnham*, 27 Wis. 187; 35 Wis. 171; 2 Ohio St. 241; 22 Cal. 620; 37 Id. 596; 35 Wis. 653.

W. W. Corlett, for the defendant in error, cited: 1 Pars. on Con. 478; *Necker v. National Bank of Hagerstown*, Cent. Law Jour. 1875; 471; *Talmage v. Bell*, 3 Selden, 328; *Fowler v. Sealy*, 72 Penn. 461; R. Stats. of the United States, sec. 5136.

By the Court, BLAIR, J.: The plaintiff below, who is also the plaintiff in error in this court, filed her petition in the court below, setting forth substantially the following facts: That on the tenth day of November, A. D. 1874, the said defendants, A. G. Swain and George Little, were copartners, doing business under the firm name and style of Swain & Little, at Laramie city, county of Albany, Wyoming territory, and while so copartners and doing business as aforesaid, did on said tenth day of November, 1874, at said Laramie city and county of Albany, and territory aforesaid, make their certain promissory note in writing, dated on said day, and did deliver the same to said plaintiff, by which said note the said Swain & Little did promise to pay to the said plaintiff, or her order, the sum of three hundred and twenty-five dollars, six months after the date thereof, with

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interest thereon at the rate of two per cent. per month, payable monthly; that the plaintiff is still the owner of said note, and that the same, nor any part thereof, has ever been paid. The plaintiff further alleges that before said note became due and payable the said firm of Swain & Little was dissolved by mutual consent; and that the said Swain, after the said dissolution, carried on the business in his own name, and did assume to pay the indebtedness of the said firm of Swain & Little. The petition further alleges that after the dissolution of said firm, to wit, on the twenty-seventh day of January, A. D. 1875, the said Swain did enter into a certain contract with certain of his creditors and the creditors of Swain & Little, by the terms of which contract the said creditors became parties thereto, to wit, the defendants in this action, by which contract the said defendants promised, agreed and undertook in consideration of the goods, wares and merchandise, book accounts, notes, bills, moneys, credits and effects of the said A. G. Swain, which the said Swain did on his part promise and agree to and did thereafter, according to the tenor and effect of said contract, assign, turn over and deliver to said defendant's creditors or their agent, to sell and convert into money, all of said goods, property and effects aforesaid, and out of the proceeds thereof to pay certain claims, notes, bills and accounts, existing against the said Swain & Little and the said A. G. Swain in full, and to divide the residue, *pro rata*, among all the remaining creditors of said Swain & Little and the said A. G. Swain.

The petition further avers, that the contract mentioned as aforesaid was signed and fully executed by the said A. G. Swain, of the first part, and by the Wyoming National Bank, aforesaid, (a corporation duly organized under the laws of the United States and doing business under the said corporate name in the county and territory aforesaid), and by divers other creditors of said Swain & Little and the said A. G. Swain, of the second part. The petition further avers, that all of the parties of the second part who

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signed said agreement or contract aforesaid, by reason of the terms thereof did promise, agree and undertake to pay, or cause to be paid, out of the proceeds of the goods and effects aforesaid the amount of said plaintiff's claim, with all interest due thereon. That the plaintiff wholly relied on the good faith of the said contract and the stipulations therein contained, and accepted the same in good faith as security for the payment of her said claim, and so relying, she did not take any steps to or attempt to collect the same of the said Swain & Little. That at the time the said contract was entered into, the said Swain had sufficient property out of which she could have made her entire claim.

The petition further alleges, that immediately after the execution of the contract aforesaid, to wit, on or about the twenty-seventh day of January, A. D. 1875, according to one of the provisions of said contract, one N. L. Andrews took nominal possession of the store of said Swain as the agent of the defendants, and did remain in nominal possession of all the goods, wares and merchandise therein for the space of thirty days; that said Swain failed during that time to effect a compromise with his said creditors and the creditors of Swain and Little, and thereupon turned over to said Andrews, as the agent of said defendants, all the goods wares, merchandise, moneys, credits, book accounts, and effects of said A. G. Swain, amounting to—— dollars; and that said Andrews took possession of the same as the agent of the creditors of defendants; and further, that the effects so turned over to said Andrews were more than sufficient to pay all the preferred creditors mentioned in said contract, leaving a large sum to be divided among other creditors of said Swain & Little; that the effects thus turned over have long since been converted into money and divided among several creditors of the said Swain and Swain & Little; but that no part of the claim of the plaintiff has ever been paid, either to her or to any one for her, by the said defendants. A copy of the note and contract aforesaid are filed with the plaintiff's petition.

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It appears from the record in this case that the Wyoming National Bank, by its attorney, separately appeared in the court below and filed a demurrer to the plaintiff's petition, and assigned three causes of demurrer, viz :

1. That there is a misjoinder of parties defendants.
2. That several causes of action have been improperly united.
3. That the petition does not state facts sufficient to constitute a cause of action against the defendants.

The court below sustained the demurrer to the plaintiff's petition, and this case is brought here for review. We will examine the first cause of demurrer assigned, and inquire, first, is there a misjoinder of parties defendants in this action? It is important to bear in mind that there is an action of assumpsit brought by the plaintiff to recover the amount of a note executed, not by the defendant, but by the firm of Swain & Little, to the plaintiff. Like all actions of assumpsit, it is based upon a promise. It is alleged in the plaintiff's petition that according to the terms of a certain agreement entered into between A. G. Swain, of the first part, and the Wyoming National Bank and other creditors of Swain & Little, and A. G. Swain, of the second part, one Andrews should convert certain goods, wares and merchandise, the property of the said A. G. Swain, into cash, and out of the proceeds thereof pay and discharge the note held by the plaintiff against the firm of Swain & Little. The contract filed with the plaintiff's petition shows conclusively, if it shows anything, that it was a contract entered into by Swain, a party of the first part, and the bank and other creditors of A. G. Swain and Swain & Little, as parties of the second part; and if any promise was made to pay the debt of the plaintiff, it was made by the parties of the second part to Swain, not by Swain. We are, therefore, of opinion that there is a misjoinder of parties defendants in this action, in making Swain a party defendant; and where such is the case, under the compiled laws of this territory a demurrer will lie: See Compiled Laws, 44, sec. 85.

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The second cause of error assigned, having been abandoned by counsel of defendant in error in the argument in this court, it will not be considered. It would hardly seem possible that the plaintiff in error could claim that the supposed promise or assumpsit upon which this action is founded, was made to her either directly or indirectly; yet the averment in the petition of the plaintiff "that she relied wholly and entirely on the good faith of the said contract and agreement therein contained, and accepted the same in good faith as security for the payment of the said sum of money to her; and relying upon said contract as aforesaid the said plaintiff did not take any steps to, or attempt to collect said note from the makers" would seem to imply that she did so regard it. Grant for the sake of argument that this averment is true: Does it state a cause of action in any view of the case, in favor of the plaintiff, and against the defendant? We think not; and why? Because there is no contract stated between the plaintiff and defendant. To establish a contract between the plaintiff and defendant there must appear that there were reciprocal or mutual obligations between the parties; not merely that the plaintiff remained passive at the time the contract referred to was entered into, but on the contrary, it must clearly appear that she bound herself to do or not to do some given thing. If the plaintiff accepted the contract as alleged in her petition, she did so of her own volition, as it is nowhere alleged or appears that the defendant requested her acceptance of the said contract. The proposition will hardly be questioned that all contracts to be legal between parties, the obligations must be mutual and binding upon both. If both parties are not bound there is no contract.

Did the plaintiff forebear to proceed to collect by law the amount of her claim against Swain and Little, as she alleges she did? If so that was her own concern; as she was under no obligation to the defendant not to do so. We are unable to see that there is any consideration between the plaintiff

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and defendant upon which to base a promise in law. That there must be a consideration of some sort is admitted. It need not necessarily be a moneyed consideration. If the consideration of a contract be a detriment to the promisee such detriment must accrue at the request of the promisor: Par. on Con. 5 Ed. 431, 448, 450.

Counsel for the plaintiff in error, in their argument before this court, also assumed the position that, according to the legal effect of the agreement heretofore referred to, the defendant in error agreed with or promised Swain to pay the claim of the plaintiff. We find it extremely difficult to see upon what principle such an assumption can be sustained. The contract upon which such a promise is based forbids such a conclusion. It is well settled that in no case can a stranger to a contract maintain an action upon it, or for the breach of it; save in the exceptional cases where the promisee was considered merely the agent for the stranger and where the stranger was regarded as the trustee of the party to whom the promise is made: Par. on Con. 5 Ed. 466-8.

At all events as the promises in this case alleged were under seal, then all the authorities seem to agree that a stranger cannot maintain any action for a breach of the promises: Par. on Con. 5 Ed. 475, 478.

It seems to the court that there is no error in the judgment of the court below, and that it should be affirmed.

Judgment affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF
WYOMING TERRITORY.
MARCH TERM, 1878.

DEAR *v.* TRACY.

EVIDENCE—BOOKS OF ACCOUNT.—Where a witness testified of his own knowledge that goods were delivered, and that the entries therefor were made at the same time by his clerks in his books of account: *Held*, that the delivery and charges being contemporaneous, it was immaterial whether the testimony of such clerks was introduced or not, as their testimony would only go to the weight of the evidence.

ERROR to the First District Court for Laramie County.

A sufficient statement of the case appears in the opinion of the court.

E. P. Johnson, for plaintiff in error, cited: Sec. 320 Code Civil Pro.; Seney's Code, secs. 288 and 435 to 441; 16 Ohio St. 273; 22 Id. 208.

W. R. Steele and *Wm. H. Miller*, for defendant in error, cited: 1 Greenleaf (Redfield ed.), secs. 117, 118, 120; Laws of Wyoming, pp. 73 and 74, secs. 319 and 320; *Anthony v. Stimpson et al.*, 4 Kansas, 211.

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By the Court, PECK, J. All the errors assigned were abandoned upon the argument but two. These two are :

1. That the court below admitted, in evidence for the plaintiff (below, defendant here), the items of the account not shown to be in the handwriting of J. W. Dear.

2. That the court admitted Dear's evidence. These two alleged errors appear by the transcript to be the same objections in different forms ; the most explicit statement of which in the first-mentioned form means that the court admitted, in evidence for the plaintiff, the items of account not shown to be in the hand of Dear. This furnishes the only question that is before us. The petition below originally contained a count for goods sold and delivered and money lent ; also a count for an account stated. The latter was withdrawn upon the trial, leaving the suit simply one for goods and money. The answer is the general denial. Annexed to the count for goods and money is an itemized copy of account as a specification of the goods and money sued for. This copy of account contains other charges than for goods and moneys, as sundry charges for meal tickets, pool tickets, boarding, and games of billiards, which other charges, however, were not embraced in the cause of action ; and if treated below as a basis of recovery, are here out of question. The transcript shows that the plaintiff, to make out his case, produced his books of account, and testified : "These are my books of original entry and blotters of the store. They show continuous dealings, and the entries were made at the times of the transactions, or supposed to be. The entries are made by three parties—myself, my brother and George Knox. They are my authorized clerks. My brother and Knox are in Nebraska. I am positive the goods were delivered at the time the entries were made, but I can't swear to it. Yes ; I can swear to it."

The books were then offered in evidence and were admitted against the objection that no entries were admissible which were not shown to be or were shown not to be in the handwriting of the witness. The objection was overruled,

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and the exception to it is the exception in question. Speaking of his brother and Knox as his clerks, Dear says, "they are my authorized clerks;" but he was evidently using the present for the past tense, intending to convey the idea that they were his authorized clerks when they made those entries, and the district court must have so understood him. But if his use of the present tense is to be taken literally, making a defect of substance in his evidence, it was cured by his after statement that they "were" at the time in question his clerks. Had the expression of the witness, "the entries were made at the time of the transactions or supposed to be," stopped at the word transactions, it would have laid a complete foundation for the admission of the books; but the addition of the words "or supposed to be," takes from it that effect; "or supposed to be" means simply "as we, my brother, Knox and I understood;" that is, each understanding that the other two made their entries contemporaneously with the transactions covered by them. Dear's statement that the goods were charged as delivered made the books evidence as to the goods; but not as to the other charges, which were in suit; and that because the charges for the goods, the deliveries and charges being contemporaneous were a part of the *res gestæ* constituting each delivery and its corresponding charge one transaction; because the charges were so admissible it was immaterial whether the clerks were living or dead, within or without the jurisdiction, in or out of the court at the time of the offer, the absence of their testimony going only to the weight of the evidence of the books. This accords with a clear, well established and familiar principle of the common law, to prove which, elaborate citations are unnecessary: 1 Greenl. Ev. secs. 117, 118, 120. It is unnecessary to pass upon section 320, at page 72 of the compiled laws; and we do not at all consider the statute in deciding the case. The offer of the books, justly construed, was limited to the evidence which justified it, and therefore to the deliveries of which contemporaneous charges had been made. The books were

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admitted simply upon this offer. It is true that the transcript indicates quite clearly that having been admitted, the plaintiff below used them as proof of all the entries in the account embraced in the issue; but this was because the defendant, either by inadvertence or design, omitted to confine their use to the ruling.

The judgment below is affirmed; but without the five per cent. allowance permissible in cases of dilatory appeals.

PEASE v. THE TERRITORY OF WYOMING.

COUNTY TREASURER—FEES.—A county treasurer, under the statute of Wyoming, is not entitled to a percentage for paying over at the expiration of his term to his successor the funds of the county then remaining in his hands as such treasurer. He should only receive a percentage on the money paid out by him while performing the ordinary duties of his office.

ERROR to the Second District Court, for Albany County.

C. W. Bramel, for plaintiff in error.

M. C. Brown, for defendant in error.

By the Court, BLAIR, J. The only question involved in the case in the court below or here is one of law arising upon an agreed statement of facts submitted to the court below by the defendant in error in this court. Plaintiff below and the plaintiff in error here being defendant below.

The question presented by the record is simply this: Is an outgoing county treasurer entitled, under the laws of this territory, to a percentage on moneys received by him as county treasurer and by him turned over to his successor in office. The court below decided this question in the negative, and rendered judgment against the defendant and in favor of the plaintiff for the amount, with interest, which

appeared by the agreed statement of facts; that the defendant, as county treasurer, had retained, as a percentage on the moneys turned over by him to his successor in office. From this decision and judgment of the court below, the defendant in the court below and plaintiff in error here, appealed, and assigns as error:

1. That the facts set forth in said statement of facts submitting controversy, are not sufficient in law to maintain the aforesaid action thereof against the said L. D. Pease.

2. That the said judgment was given for said Territory of Wyoming, when it ought to have been given for the said L. D. Pease, according to the law of the land.

A proper construction of that part of section 60, page 564 of compiled laws of this territory, which prescribes the compensation to be received by the county treasurer for his services as treasurer, cannot, we think, fail to determine whether either of the errors assigned by the plaintiff in error are well taken. Section 60, before referred to, after prescribing the duty of each county treasurer, declares: "and for his services as treasurer he shall be allowed three per cent. on the dollar on all sums received and paid out by him." It is admitted in argument, that there must not only be a receiving, but paying out, to entitle the treasurer to the percentage mentioned in the statute, but it is maintained by the plaintiff in error, that a turning over to his successor in office of all moneys in his hands as treasurer is such a paying out within the meaning of the statute as entitles the outgoing treasurer to the percentage prescribed by law. We do not think so. Such a construction of the statute would do violence to the evident intent of the legislature. We think it is apparent that the legislature intended, and the obvious meaning of the section is, that the county treasurer should receive for his services three per cent. on the dollar, on all sums received and disbursed by him in the manner prescribed by law, during his continuance in office. When the term of his office expires his successor assumes, and is clothed with all its functions, and all moneys in the

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possession of the outgoing county treasurer passes with the office to his successor, and consequently is not paid out within the meaning of the statute, but remains in the treasury.

Counsel for the plaintiff in error also assumed the position in his argument before this court, that if the court should hold that a delivery or turning over by an outgoing treasurer to his successor in office, of all moneys in his possession as county treasurer, is not such a paying out as would entitle the treasurer to the percentage named in the statute; then, in that event, he would be entitled, under section 12, page 346, of the compiled laws of this territory, to a reasonable compensation for his services.

The section referred to reads as follows: "That for any services rendered by an officer, wherein no fees are allowed by this act, or any other act or provision of law, such officer shall be allowed a reasonable compensation therefor." There is certainly no ambiguity in this section. It simply provides that where no fees are allowed by law to an officer for services rendered, such officer shall be allowed a reasonable compensation for such services. But, inasmuch as section 60, before referred to, does expressly fix the compensation the county treasurer shall receive for the services alleged to have been performed by the plaintiff in error, we fail to see that section twelve, cited by counsel, has the slightest bearing on the point this court is called upon to decide. We see no error in the ruling of the court below, and its judgment is affirmed; but, inasmuch as it appears to the court that there were reasonable grounds for the proceedings in error, the five per cent. mentioned in the statute is not allowed in this case.

WHITE v. SISSON, WALLACE & CO.

PROCEEDINGS IN ERROR—PRACTICE.—A party to have errors complained of, reviewed by the supreme court, must have his bill, containing all exceptions upon which he relies, together with the motion for a new trial, signed or allowed by the presiding judge of the court below.

ERROR to the District Court for Uinta County.

A sufficient statement is contained in the opinion.

H. Garbanati, for plaintiff in error.

Wm. G. Tonn, for defendant in error.

By the Court, BLAIR, J. This cause is brought here by the plaintiff in error from the district court of Uinta county on a writ of error, and what is termed a "transcript." No bill of exceptions appears to have been made up and signed in the usual manner and in accordance with a rule of this court, that the alleged errors in the court below may be here reviewed.

The defendant in error files in this court a motion to affirm the judgment of the court below, for the reason that the proceedings of the court below are not presented to this court in such a manner as is required by law and the rules of court to enable the court to review the same.

This court has heretofore held, in the cases of *Murrin v. Ullman*, *Geer v. Murrin*, and numerous other cases, that a party to have errors complained of reviewed in this court must have his bill containing all exceptions upon which he relies, together with the motion for a new trial, signed or allowed by the presiding judge of the court below. We see no reason to question the wisdom of the rule and practice so long adhered to by this court in that regard, the motion of the defendant in error will therefore be sustained, the proceedings in error be dismissed, and the judgment of the court

Argument for Plaintiff in Error.

below affirmed; but inasmuch as it appears to this court that there were reasonable grounds for the proceeding in error, the five per cent. mentioned in the statute is not allowed in this case.

PECK, J., dissenting.

HILLIARD FLUME AND LUMBER CO. v. WOODS.

EVIDENCE.—Although an error was committed by the district court in admitting certain documentary evidence, yet where it clearly appears from the record that the jury could not have been misled thereby, the judgment of the court below should not be reversed on that ground.

MEASURE OF DAMAGES.—Where certain railroad ties of plaintiff had been wrongfully converted and sold by defendant: *Held*, that plaintiff was entitled to recover the highest market price for the same that was paid at any time between conversion and judgment.

JURISDICTION OF APPELLATE COURTS—WEIGHT OF EVIDENCE.—The supreme court should not reverse a judgment of a lower court because it might or would have arrived at a different conclusion upon the evidence adduced. The appellate court should only reverse where there is no testimony to sustain or rebut a material allegation, or where it is apparent that the jury have been controlled by improper motives, or have misunderstood the evidence.

ERROR to the District Court for Uinta County.

A full statement appears in the opinion.

Wm. G. Tonn, for plaintiff in error, contended: 1. That the verdict was not sustained by sufficient evidence, and was contrary to law; 2. That the jury erred in the assessment of damages; 3. That the court erred in permitting an affidavit made in another action to be introduced in evidence by one of the witnesses for the defense, and in the admission of other testimony; 4. That the court erred in the instructions to the jury; 5. That the court erred in overruling the motion for a new trial, and cited: *Clark v. Skinner*, 20 John. 465; *Pattison v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barb. 304; *McCurdy v. Brown*, 1 Duer, 101; *Hooben v.*

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Bidwell, 16 Ohio, 509; *Oliphant v. Baker*, 5 Denio, 379; *Terry v. Wheeler*, 25 N. Y. 520-5; Benj. on Sales, 315, 774; Sedg. on Damages, 583, 591.

H. Garbanati, for defendant in error, cited in opposition: Hilliard on New Trials, sec. 2, p. 21; sec. 3, 446; also sec. 10, p. 449; sec. 19, pp. 451, 456; 1 Pars. on Contr. 529, 532; *Graff v. Fitch*, Am. Rep. 85; Laws of Wyoming, p. 358, sec. 2; 1 Pars. on Contr. 527; Lang. on Sales, 153-85; 1 Greenleaf, sec. 27; Hilliard on Torts, p. 69, sec. 27; 2 Addison on Torts, 559; Sedg. on Damages, 478-9.

By the Court, PECK, J. This is an action of trover for the conversion of three thousand railroad ties of the value as alleged in the petition below, of six hundred dollars; the answer is the general denial; the trial was by jury, and a verdict rendered for the plaintiff below, for five hundred and forty-two dollars and fifty cents, interest included. Under the instruction of the court, I now read its opinion, having prepared it upon a scrupulous examination of the bill of exceptions, of which the exceptions and the matters on which they rest cover over seventy pages.

The first exception is to the admission of the following question, put to William K. Sloan, a witness called by the plaintiff, on his re-direct examination, namely: "What were ties then selling for at the railroad?" The exception is urged upon the proposition that the rule of damages in trover allows a recovery for the highest market price or value attributable to the property, between the conversion and the trial, but confines it to the highest at the place of conversion. Granting this proposition as true, let us see what conclusion it leads to. A market, in the sense of a rule of charges, is either a district of country in which trade in one or several articles is habitually conducted as to furnish a criterion of value of the thing or criteria of the values of the things there sold, or is it the point of trade to which the trade of a district centers.

As the evidence stood when the exception was taken, it

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tended to show, and for the purpose of testing the exception, must be treated as showing that Bear river was the water route for the transportation to market of the cutting of the timber lands lying upon its border, and it is judicially known to pass from those lands to Hilliard through a wild and thinly-settled country; that in the spring and early summer of 1876, Woods owned and possessed three thousand ties, lying at Hayden's Fork, upon the river, separate from all others; that the company knew that he had the ties there, and could have ascertained their identity; that Woods, being such owner and so in possession, and the ties so separated and susceptible of identification, the company, with full knowledge of these particulars, artfully appropriated and converted the ties, and thereupon, through its agent, the Evanston Lumbering Company, took the ties and floated them down the river to the Big Bend, so called, of the river, which is about three miles east of Evanston, loading them at the tie switch of the Union Pacific Railroad, this switch being in the side track by which ties supplied to the road are received and distributed over it; that the road created the only market for ties existing in that part of the country; and that the entire tie manufacture upon that water route was for the supply of the road; that Coe & Carter, as supply contractors, collected for and delivered to the road all the ties used by it, and the other parties engaged in the tie trade along that route supplied directly or indirectly to them; that the Hilliard Flume and Lumber Co., having received the ties in question from the Evanston Lumbering Co., at the Big Bend or tie switch, sold and delivered them in July or August, 1876, to Coe & Carter.

. That evidence further shows that the Hilliard Flume and Lumber Company was engaged in the tie trade upon this route, manufacturing ties in the timber lands, also obtaining them from sub-contractors; that the Evanston Lumbering Company was engaged in it on this route; that as early as January, 1875, Burris & Bennett were under a contract

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with the Hilliard Flume and Lumber Company to supply it with ties upon this route; that in or about the spring or early summer of that year, Woods conditionally sold three thousand to Burris & Bennett, to apply upon their contract with the Hilliard Flume and Lumber Company; but that evidence does not tend to show where these several contracts were made, nor where the different lots of ties respectively embraced by these contracts were when the contracts were made, with the single exception of those conditionally sold, nor, with that exception, whether the ties were cut, nor, with the exception of the two contracts of Burris & Bennett, where the deliveries were to be made. From the nature of the case, one of two things must follow — either that the whole water route between the timber lands and the ultimate point or points of delivery at or along the route was a tie market, or that the big bend at the tie switch was the, or a, market, as being the, or one of the, objective points of supply for the route, and therefore to its district a point or the point to which its trade centered, therefore its center, or one of its centers, of trade. This point necessarily prescribed, so far as can be seen from the evidence, the most definite, accurate and reliable standard of price in the trade between it and the timber lands, and we therefore regard it as the market. Now, the proposition on which the exception is urged evidently treats Hayden's Fork, and therefore the *locus* of the conversion, as the place to furnish the value of the property converted, conceding this the value at the time of the sale and delivery to Coe & Carter, in July or August following, or during these months, the point or period of time embraced by the question, would be the price of such ties then prevailing at the bend or switch, less the price of transportation from the Fork; but if that rule prevails another must be complied with.

The company subjected itself to its willful tort to the sale, that having been added to the value of the transportation, it did it for the benefit of the owner, otherwise it could commit the tort and escape one of its consequences: Sedg. on

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Damages, 483 and 484. To so familiar a principle, further citation is unnecessary. Had Woods recaptured or replevied the ties after this addition of value, instead of suing in trover, he could have had them as he found them, and would not have been compelled to account to the company for the added value. He has the same exemption in trover, in which he may recover the value of what he might have had in another form in the things themselves. Hence the question objected to was strictly competent, for it simply called for the price prevailing at the tie switch where the company sold to Coe & Carter, which was calling for the Hayden Fork price, plus the transportation. The proposition, however, on which the exception is urged, proceeds upon a supposed American rule. Whether there is such a rule, or, if one, whether the proposition accurately states it, it is unnecessary to inquire. The English rule governs this court; according to that, where the price or value of the converted property fluctuates between the conversion and the trial, it is held proper that the plaintiff should recover the highest market value, which the property or like property has reached in its intended market during that interval; and this upon the two-fold ground of making him good and of preventing the converter from profiting from his own wrong; leaving it, however, to the jury to allow, in its discretion, the highest damages under this principle, or lower damages: Sedgwick on Damages, 476 to 479, 494 to 495.

That criterion would have enhanced the price at the tie switch at the time pointed at in the question excepted to, the transportation upon another principle already explained included. The price of the English rule becomes more dear when we consider that the water route and the market at the bend or switch were as open to the plaintiff as to the company when the latter unlawfully attempted to deprive him of that opportunity for profit, and it was his right to be restored to what it thus endeavored to take from him; and the competency of the question is rendered still more clear by the fact that the cross-examination preceding it

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had developed from the witness the fact that Coe & Carter, as the tie suppliers of the road, created the market, and when they were not buying, it was down. It was entirely consistent at this point for the plaintiff to ascertain how it was when they were buying. Being competent, the question was relevant.

The witness answered that the price was forty cents for ties and twenty for culls on a two years' credit, therefore the defendant moved to strike out the answer as incompetent and irrelevant; the motion was overruled and an exception taken.

The answer was competent, and therefore relevant, because it furnished something of a standard by which to arrive at a cash value at that time. Louis Bennett, a witness for plaintiff, was asked by him how it happened that he, plaintiff, used the brand B. and BB. for the ties, the question was objected to as irrelevant, admitted, and an exception taken; the ownership and possession of the ties at the time of the alleged conversion were in issue, the question went directly to the identity, and was relevant.

In rebuttal the plaintiff offered in evidence a document purporting to be a copy of an affidavit made by W. K. Sloan, on the behalf of the Hilliard Flume and Lumber Company, in a suit of replevin instituted by the company against Burris & Bennett, in Utah county, in the third judicial district of Utah, for certain railroad ties; its admission was objected to as not being properly authenticated; the objection was overruled and an exception taken. The document is not properly authenticated, the attestation of the clerk which is upon it being unverified by an accompanying certificate of a judge of the court in which the original purported to be as required by U. S. Rev. Stat., p. 170, sec. 905; and though Sloan, in connection with the offer admitted on the stand that he had made at Salt Lake City an affidavit for the company against Burris & Bennett, he does not admit the making of the affidavit in ques-

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tion. The objection, therefore, was sound, and should have been sustained; but the error was cured by the fact that after the reading of the document Sloan was recalled and distinctly admitted its verity.

The defendant further objected to the document upon the ground that it was an attempt by the plaintiff to impeach his own witness, meaning Sloan; that it contained nothing contradictory of any of the testimony of the defense; that it was not rebutting and was irrelevant. The affidavit conflicted with no evidence which had been given; Sloan as a witness for the plaintiff, therefore, cannot be said to have been employed by the plaintiff to impeach his own witness. It did, however, conflict with evidence of Sloan given as a witness for the defense. The plaintiff, in his opening, introduced evidence tending to show that Burris & Bennett had contracted with the defendant to deliver ties to it at its feeder, which was on the stream at or below the Fork; and under this contract, in the spring of 1875, put into the Fork some twenty-five thousand to twenty-nine thousand ties, and branded them B. and BB., in order to distinguish them as their contract ties; that they embraced the three thousand ties which he had conditionally sold to them, as above stated, and which had been put into the stream by them above and at the rear of the others, and which were marked in the same way; and while the conditional sale was in force, that Burris & Bennett began to float or drive the whole lot, so collected in the Fork, down to the feeder, when the water failed and the drive was, in driving parlance, "hung up;" that while so hung up, Burris & Bennett, failing to pay for the wood ties and acquiring the title to them, agreed with him to cancel the sale and return them; and that by way of a cancellation to return, three thousand of like ties should be counted off from the rear of the drive as his, and in July of the same year this was done, and the three thousand so counted off and delivered there by Burris & Bennett to and accepted by him as the restored ties, and they were then physically separated from the rest of the drive a distance of

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fifteen to twenty feet and cross-piled upon the bank, the remainder of the drive left as before, and consisting of the Burris & Bennett contract ties; that the drive continued so hung up until in June, 1876, when the Evanston Lumbering Company, as the agent of the defendant, under a special contract and by its special direction, given for the purpose of having the contract executed, took possession of all the B. & BB. marked ties at the Fork and upon the stream and drove them down for the defendant. Beard testified for the defense that he was the defendant's agent at the feeder or boom, authorized to contract with Burris & Bennett for ties for the company, and to receive them and pay for them in provisions and other supplies out of the company's store at the feeder, which was kept there to supply tie and lumbermen, and the charge of which was a part of his agency, and see to their boarding, that as such he contracted with them for ties.

That afterwards in January, 1875, Woods contracted the three thousand ties to Burris & Bennett, to be delivered by them to the company under their said contract with it, and deliver them over to Burris & Bennett, accordingly and thereupon the latter delivered them to him as its agent, and after they had been so delivered to him, that they were branded with the B. & BB. mark to distinguish them as the company's ties as received from Burris & Bennett under its contract with them.

Beard further testified that the contract so made between Burris & Bennett and the company, before the Woods' contract was made with them, called for a delivery by him to the company at the boom or feeder. That after Woods had so sold to Burris and Bennett, the original contract between Burris & Bennett and the company, the company was verbally changed, so that the company might receive their ties wherever they were, whether in the timber or between it and the feeder or along the stream at different prices, but to be paid for at the full original price for what he should deliver at the feeder; that under the contract so modified, the

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company received and took into its possession all the Burris & Bennett ties in the timber along and in the stream, and had them marked with the same B. & BB. brand, and with its own branding iron furnished for the purpose and for the same purpose of distinction as in the case of the Wood ties. After the defendant had thus in its defense introduced evidence to show, and tending to show, that all the B. & BB. ties had been delivered and received into its possession under its contract with Burris & Bennett, by the time of the hanging up of the drive in August, 1875.

Sloan was put on for the defense and testified, that in the fall of 1875 he went up to the Fork and rode along the entire drive, wherever the B. & BB. ties were, inspecting them, and saw no ties separated at the upper or rear end from the rest, and that in his opinion he must have seen such a separation had there been one; that on the other hand, all the ties seemed to be massed together in the stream.

The very object of this testimony by Sloan was to refute the plaintiff's evidence, so far as it tended to show that the sale by Woods to Burris & Bennett was conditional, that the condition was not performed, and that as a consequence the contract had been cancelled, and his three thousand ties restored to him by a counting off and separation from the rear of the drive.

Wherefore, on the other hand, all the ties at the upper end lay in an undistinguishable mass with the rest of the ties, as the company's ties, and that the ties in question had been left in its possession as originally delivered to it. This was evidently to corroborate Beard, and treated the ties as then in possession of the company. No evidence was adduced for the defense to show that the possession of the company had prior to May 25, 1876, shifted to Burris & Bennett, and on the face of the defendant's evidence it appeared as a fact that they had received possession prior to and retained it up to that date. This was the status of the testimony; the plaintiff began to rebut, and under the rebuttal he called Sloan as a witness, and his

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evidence given at this time implies that it was in answer to an inquiry, or inquiries, whether he had ever testified that the company had not received possession from Burris & Bennett under the contract. This examination, however, was manifestly to lay the foundation for introducing the affidavit, and was for that purpose indispensable. He answering in the negative, the foundation was laid for introducing the instrument. It was introduced, and contradicted his evidence given for the defense, because it stated that on the twenty-fifth day of May, 1875, the possession was in Burris & Bennett. But the affidavit is not merely the declaration of Sloan. It is the declaration of the company in a suit instituted by it to obtain the possession of the ties as then held by Burris & Bennett, and was therefore pertinent as contradicting its defense as contained in the testimony of Beard. The affidavit was therefore contradictory of material evidence adduced for the defense, was relevant and rebutting. In the rebutting the plaintiff offered an order for four hundred and thirty dollars, dated March 22, 1875, drawn by Burris & Bennett in his favor on the company, and accepted by Beard; the offer was objected to as irrelevant, not rebutting and incompetent, was allowed, and an exception taken. Beard as a witness for the defense, in addition to his testimony as to his agency for the company and its extent, his contracting with Burris & Bennett for ties, and the subsequent contract between them and Woods for the ties of the latter to be delivered to Burris & Bennett, to be applied upon their contract with the company, and to their being so delivered; all this shows that the Woods' ties were owned and possessed by the company when they drove them to the Bend, also testified that after these ties had been so delivered to the company he, as such agent, supplied out of the store sundry provisions to Woods on orders of Burris & Bennett towards payment of the ties, and entered them upon the store book, in corroboration of his testimony producing such a book.

In the rebutting, Woods testified that on March 22,

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1875, he sold to Burris & Bennett a pair of mules, took in payment for them the order in question, and with the understanding that he was to get provisions upon it on their account from the store; that Beard accepted it, and that he did get provisions upon it accordingly; and that the provisions which he got there, and which Beard had sworn to as obtained of him, were got on that order, and not on account of his ties. This testimony by Woods was clearly rebutting, and very properly not objected to. At this point the order was offered and correctly admitted, because it went in direct confirmation of the testimony just given by him; it was relevant, rebutting and competent.

The plaintiff requested the court to charge that possession of the ties was *prima facie* evidence of title, and that should they find that he was in possession when the defendant drove them from the Fork, the latter must have a preponderance of evidence to prevent a recovery. The request was complied with, and the defendant excepted. The request was properly granted.

The plaintiff next requested the court to charge that if the jury should find that Woods owned the ties and the defendant converted them, it was not necessary to find that they were in the possession of the plaintiff at the time of the conversion, meaning to entitle the plaintiff to recover. The request must be construed in the light of the evidence relating to it. It required the jury to find two distinct facts, ownership in the plaintiff and a wrongful conversion, as the conditions of a verdict for him. If, under any tendency of the evidence the jury might have found these facts, the request was proper. It was a starting point on both sides, that the plaintiff originally owned the ties. The jury might have rejected the evidence of Beard as to an arrangement by which the title and possession of the ties was claimed to have passed to the company, and have found that the plaintiff made a conditional sale and delivery, just as the evidence on his side tended to show. If they so found, they found as attributes of the sale that the delivery

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under it was conditional, and the credit and possession allowed to the vendees were terminable at the plaintiff's will, the right to immediate possession thus remaining in him, drawing after it a constructive possession.

The jury might next have found that the actual possession so passed to the vendees was not reclaimed, as the plaintiff's evidence tended to show. They must then have found the fact as claimed by the evidence of the defense, as well as admitted by its principal manager, Sloan, in the plaintiff's opening case. While the possession was so left with the vendees, the defendant appropriated the property at the Fork in the driving season of 1876, as its own actual property, drove it to the Bend as such, and as such sold and delivered it to Coe & Carter, either of which acts would have constituted a wrongful conversion committed upon the plaintiff's right of possession. Or the jury might have gone further, and found that after the conditional sale and delivery to Burris & Bennett had been made, as aforesaid, the contract was cancelled, and the ties restored to Woods, and thereupon piled upon the banks, apart from the rest of the drive; and, in July, 1875, just as the evidence on his part tended to show, and have also found that in the fall following, when Sloan inspected the drive, they had, by some interference, though unexplained, been placed back into the drive, and, when he saw them, being mixed in with and as a part of the drive, and had further found that Burris & Bennett had not delivered any of the drive to the defendant. Had the jury gone so far in their conclusions, they would have found that they had gone back into the actual possession of Burris & Bennett, though still in the constructive possession of Woods; next finding the several acts of conversion committed, as aforesaid, by the defendant, they would have found a wrongful conversion committed upon the plaintiff's right of possession. We think that the request was properly granted.

The plaintiff requested the court to charge that if the jury should find that defendant was to have furnished Woods

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with provisions or other property, on condition that he turned over his ties to Burris & Bennett, they must find that the defendant complied with its condition before it could acquire any right in the ties, and that the ties were first turned over by Woods and afterwards by Burris & Bennett to the defendant. The request was granted, and defendant excepted. There was no evidence on the part of the plaintiff, tending to show any such contract; that on the part of the defense tended to show only a contract of sale as to which the defendant would at most only be conditionally liable to Woods for such credit, if any, as Burris & Bennett might have with them. The request contemplated an absolute contract between Woods and the defendant composed of reciprocal conditions, and requiring contemporaneous performance. No evidence tended to show such a contract. It was, therefore, abstract and inappropriate. It was improper to grant it, but the error could not have misled the jury, who must be supposed to have understood the evidence as accurately as we do, was harmless, and the refusal not ground for reversal.

The plaintiff requested the court to charge that the measure of damages was the highest market value of first-class quality of ties between the alleged conversion and "this time," meaning the time of the trial, with interest; the request was granted, and the defendants excepted. We have already shown that the request was correct as to the market rate, and the period during which the plaintiff might apply it. In the absence of any proof as to the quality of the ties having been established, the law would presume that the ties were of the best quality: Sedg. on Dam. 475. There was no evidence to the contrary, and the presumption held. Moreover, the plaintiff testified that they were good. This was not denied, and stood conceded. On the argument, the counsel for the plaintiff in error, explained to us, that there were two classes of ties, the standard and the culls, which are below standard. The plaintiff's remark, that his ties were good, plainly meant that they were standard ties.

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The request referred to these good ties. We think that this request was properly granted.

The plaintiff requested the court to charge, that if there was a contract made in the cabin of Woods between him, Burris & Bennett, and the defendant, by which he was to turn over his ties to Burris & Bennett for defendant's benefit, they must find the contract was executed; or if conditional, that the conditions were complied with by Burris & Bennett and the defendant. The request was granted, and an exception taken. We think that it was properly granted, and for reasons too obvious to require explanation.

The plaintiff requested the court to charge that the allegation of a delivery of the ties by Woods to Burris & Bennett, and by the latter to defendant, was material, the onus of establishing it rested upon the defendant; the request was granted and an exception taken, but the request was obviously correct.

The plaintiff requested the court to charge that statements made by Bennett, repugnant to his testimony, might be considered by the jury as to his credibility, but were not binding on the plaintiff, nor to be treated as his admissions. The request was granted and an exception taken, but the request was obviously proper.

The defendant requested the court to charge that if Woods sold the ties to Burris & Bennett, to be sold and turned over by them to the defendant under their contract with it, and they did so sell and turn them over, the plaintiff could not recover. The court refused so to charge, and the defendant excepted. Had the request been based upon the finding of the jury of an absolute contract of sale by Woods to Burris & Bennett, such as Beard's evidence tended to show, it would have been correct; but had the court granted the request, the jury, finding that the sale and delivery by Woods were conditional, as the evidence on his part tended to show, would have been obliged to return a verdict for the defendant. Such a charge would have been erroneous, because the condition in the sale and delivery would have fol-

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lowed the delivery of the property and kept the title in Woods until the conditions had been satisfied. The request was therefore properly refused. The defendant requested the court to charge, that if the jury should find that the plaintiff agreed with Burris & Bennett, in the presence of defendant's agent, to sell the ties to Burris & Bennett, and the defendant by its agent then and there agreed to pay the plaintiff for the ties, on order from Burris, in money or merchandise, and did pay the plaintiff any goods on said account, and received the ties on the Burris & Bennett contract, the plaintiff could not recover unless the defendant had notice of a condition in the sale to Burris & Bennett by which the ties were to remain his until paid for. The request defined an absolute contract between plaintiff and defendant, by which on their receiving the ties they were bound to pay him for them, which means, in fact, on the simple production of an order or of orders from Burris & Bennett to that amount, and on which contract the plaintiff could have sued the defendant for the full price on failure to honor the order or orders, and therefore assumed that there was evidence tending to show such a contract. But there was no such evidence. The evidence on the plaintiff's part as to the contract for the three thousand ties was all the other way. The evidence on the defense as to the contract for them was all from Beard, and precisely the reverse.

His testimony was in effect positive and distinct that Woods agreed in his presence to sell and deliver ties to Burris & Bennett, to be turned in upon their contract with the company, and that no notice was given to him of the alleged condition of the sale; but that he refused to bind the company to Woods for any of the price; that, on the other hand, he only promised for the company to pay him on the order of Burris & Bennett, provided that on the presentation of the orders Burris & Bennett had a credit with the company out of which to satisfy them. The effect of this was to leave Woods just where he would have stood

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with the orders of Burris & Bennett in his hand, and without any communication with the company, except to present them—that is to say, the orders would have operated as assignment to him, when notice as to company of whatever funds upon their account he would have found in the hands of the company belonging to Burris & Bennett at the time or times of presenting the order. The request was properly denied.

The defendant requested the court to charge that the affidavit of Sloan did not state that Burris & Bennett had failed to deliver the ties, but that they claimed that they had failed to deliver them. The request was refused, and an exception taken. Had it been a request to charge the jury as to a correct legal proposition, based upon the affidavit, it would have been the duty of the court to comply with it. Again, had the request been to state to the jury how the affidavits read in a given particular, or correctly citing it in that particular, or to repeat to the jury so much of the affidavit, it would have been discretionary with the court to have complied with the request or not, the jury being supposed to know the contents of the document already; but the request was what in this doubtless was an inadvertence on the part of the counsel, who presented it to misstate to the jury the document in the same particular; for the request attributed to the affidavit a passage which it did not contain, and denied to it a passage which it did contain. The court, therefore, properly refused the request.

The defendant moved for a new trial upon grounds which have been disposed of, except the two following: one that the verdict was against the weight of evidence, the other that it was excessive. As to the first of these two grounds, where an appellate court is empowered to revise upon the facts, it can never reverse them, simply because upon the evidence, as submitted to it, it would have arrived at a different conclusion, and can only reverse where the verdict—or if the trial was by court, without a jury, the findings below, were so clearly against the weight of evidence that

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no mind of fair intelligence, faithfully exercised; can be reasonably supposed to have arrived at the result which is complained of, or to state the rule in a different form, but as conveying the same idea, where the evidence to such a mind, so exercised, tends to an opposite conclusion.

This rule is not simply founded in the habitual respect which is due from the appellate to the inferior court, but in the very necessities of justice a less stringent rule would inevitably invite every appellant to a new trial upon the facts in the appellate court. We are clear upon two simple considerations, without alluding to other significant ones, that Woods was entitled to recover. The evidence of the defense, though not necessarily going so far, pretty plainly indicates that Woods wanted security before he parted with his title, and is positive and full that the company refused to give any, and wanted his ties without incurring any risk to him for them. It certainly would have been remarkable if Woods had still parted with his title to vendees, whose responsibility he distrusted, upon a sure chance for possible funds of theirs in the company's hands, over which he had no control. This rather strengthens the theory of a conditional sale. But, further, Woods and Bennett testify fully and distinctly to the conditional sale. The only adverse witness on that point was Beard; the plaintiff was interested, but Beard was an agent of the defendant, and Bennett disinterested; apparently, the fair balance of testimony was in favor of a conditional sale.

As to the second of these two grounds, the market price when the company sold to Coe & Carter these ties, was not less than twenty cents a tie; that, with interest at date of the verdict, would have brought the recovery up to about six hundred and fifty dollars. The verdict at five hundred and forty-two dollars and fifty cents can be accounted for only upon the supposition that the jury allowed something as paid to Woods by Beard. We have a grave doubt whether the allowance was proper, and whether the verdict was not too small. If that be so, this error of the jury was

Argument for Defendants.

a clear gain to the defendant. We see no excess in the verdict.

The exceptions to the order overruling the motion for a new trial is thus disposed of, and the judgment below affirmed, but without the five per cent. allowance applicable to dilatory appeals.

LEE v. COOK AND COREY.

CONSTRUCTION OF STATUTES.—A law passed either restricting the time of the commencement of an action or proceedings in an appellate court should be liberally construed and should take effect from the date of its passage. It should not be construed as retroactive, but as applying to future causes, and the courts should not permit it to injure the rights of involuntary and innocent parties. The approved rule is "that the new statute affects only cases which arise after it takes effect, leaving old cases subject to the old, new cases subject to the new act."

ERROR to the District Court of Uinta County.

A motion was made by the defendants in error to dismiss the proceedings in error upon the grounds: First, that such proceedings were not commenced within one year from the entry of judgment, as required by the statute as amended; second, that the bill of exceptions was not signed and filed within the time prescribed by law.

E. P. Johnson, for the plaintiff in error, cited: *Laws of Wyoming*, 1877, 23; *Civil Code*, 522; 17 *Wallace*, 599; *Cooley's Const. Lim.* 286-87, 381-82; *Civil Code*, sec. 300; *Walton v. U. S.*, 9 *Wheat.* 651; *Irwin v. Brown*, 6 *Ohio St.* 12; 4 *Ohio St.* 500; *Comp. Laws of Wyoming*, 598.

W. W. Cortlett, opposed, cited: *Comp. Laws of Wyoming*, 300, 303; *Cooley's Const. Lim.* 370; *Price v. Mott*, 52 *Penn. St.* 315-16; *Philadelphia v. Ferry*, *R. C.* 52, 177; *Marsh v. Chesnut*, 14 *Ill.* 223; *Thames Manufacturing Co. v. Lathrop*, 7 *Conn.* 550; *Warren R. R. Co. v. Belvedere*, 35 *N. J.* 584;

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Clark v. Hall, 19 Mich. 356; *Potter's Dwarries*, 163, 166; *Cooley on Taxation*, 221-22; *Sohn v. Waterson*, 17 Wallace, 596; *U. S. v. Heth*, 3 Cranch, 413; *Hawley v. Tyler*, 2 Wallace, 347; *Ross v. Duval*, 13 Peters, 62; *Lewis v. Lewis*, 7 Howard, 778; *Murray v. Gibson*, 15 Id. 421.

By the Court, PECK, J. The first objection alleged in the motion is, that the appellate proceedings was not instituted within a year after the rendition of the judgment below. That judgment was rendered on the twelfth day of February, 1877, the statute then in force limiting the period for the prosecution of appeals to this court at section 522, page 107 of the Comp. Laws, declared: "No proceeding for reversing, vacating or modifying judgments or final orders, shall be commenced unless within three years from the rendition of the judgment or making of that order."

The act of December 15, 1877, page 23 of the laws of 1875, substitutes one year in the place of three, in the prior act the liberal reading of its extended text, therefore, being: "No proceeding for reversion or vacating or modifying judgments or final orders shall be commenced, unless within one year from the rendition of the judgment or making of the order."

This act declares that it shall take effect from December 15, 1877. The present writ of error was issued on February 18, 1878. If the new statute is to be construed literally, it is to receive a retroactive operation, and the right of appeal upon the present judgment was barred on February 12, 1878, six days before the appellate writ was issued, if the statute is to receive a prospective operation, that right was not barred when the writ was issued.

The effect of retrospective remedies is inevitably to disturb the interests of involuntary and innocent parties, and to create general distrust of legislation. Hence, it is the violent presumption of the court, that whatever language a legislature may use in a remedial statute, it intends for the statute only a future operation, and the presumption will

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yield only when it is impossible to avoid a retrospective operation. The courts uniformly agree in this principle, and whatever differences they may exhibit in its application, must be attributed to the purpose of adhering to, not of departing from, the principle. When the new statute was passed there were doubtless numerous judgments of the district courts of the territory as to which the first year from their rendition expired on December 15, 1877, or was so nearly expired on that day as to leave no opportunity for an appeal, provided the right of appeal was limited to a year from the rendition of the judgment. This construction bars the right of appeal upon these judgments, and turns the statute into simply capricious and oppressive legislation. Such mischief sufficiently illustrates the necessity and virtue of the principle above stated, and the duty of the courts rigidly to adhere to it. We see no reason for withholding the application of the principle from the present case.

Upon this subject, and to protect existing interests from disturbance by subsequent remedial legislation, the decisions constitute those general classes: all concurring in the rule, and differing only in the methods of adjusting and applying it. One of these classes holds that when claims have not been barred under the prior act, they are to be allowed a reasonable time under the subsequent acts before being barred by it, which time the court will determine; a class of decisions that is merely so much judicial legislation. Another class holds that the new statute shall operate from its date upon cases which, under the old, are unbarred, thus as to those cases giving the new statute operation, not from the accruing of the cause of action, a right of appeal as provided in the new act, but from the date of the act; a class of decisions which we cannot say accords with our view of sound reasoning, however much it may be our duty to respect them as imposing upon us a rule. The third of these classes holds that the new statute affects only cases which arise after it takes effect, leaving

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old cases subject to the old, new cases subject to the new act, disturbing neither private interests nor public confidence, and adhering to the principle in its integrity. The case of *Sohn v. Waterson*, 17 Wallace, 596, presents a striking illustration of the tenacity with which the courts hold to the principle, and prescribes an imperative rule to this court. The case involved the construction of a Kansas statute reading: "All actions founded on a promissory note, bill of exchange, writing, obligatory bond, contract, judgment, decree, or other liability rendered beyond the limit of this territory, shall be commenced within two years next after the cause or right of action shall have accrued, and not after."

Sohn obtained a judgment against Waterson in 1854, in Ohio; the act was passed in 1859, and Sohn sued Waterson on the judgment, in Kansas, in 1876. Waterson pleaded the statute, Sohn demurred, and thus the question was brought before the United States supreme court. This expression in the statute, "All actions, or any cause of action, shall be commenced within two years after its accruing, and not after," plainly signified, by a correct non-professional reading, an unlimited comprehensiveness, and embraced as well past as future cases; but often the moral and actual intent of a statute is one thing, the presumed and legal another; and the latter is to be enforced by the courts from the necessities of justice. The Wyoming statute, however, does not seem to us to be justly obnoxious to this extreme remark, construed by its moral intent. It was plain that the Kansas act was simply a piece of vicious legislation, passed in the interest of repudiation; but, judged by its legal intent, it contemplated only a prospective operation. The supreme court of the United States, affirming the judgment below, held it to be prospective, operating from its date only; thus by constructions discarding one clause from the act and substituting another, converting the clause, "two years next after the cause or right of action shall have accrued," into the clause, "two years next after the

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act takes effect.” In its reasoning, the court held that its decision was necessary to keep the statute from impinging upon the obligations of a contract; but that is only a part of the objection which constitutes the boon of the principle, that confines a limitation act to a prospective operation. The spirit of the principle and the necessities of justice equally demand that the act should not be allowed to impinge upon any existing interest, though (true it is that) the inconsistency of the methods adopted by the courts to sustain the principle and prevent the mischief consequent upon a retrospective operation, deprives the principle of full effectiveness; but the courts, uniformly and indiscriminately apply it to the protecting of all existing interests, whether embraced in, or represented by, contracts, remedies, claims of public servants for compensation, taxes, or other matters. Moreover, the court, in *Sohn v. Waterson*, did not confine the ground of its decision to the objection that allowing to the Kansas statute retrospective effect would involve a conflict with the federal constitution, but put it as well on the broad principle which we have explained. This is clear, both from the text of the opinion and its citations. We therefore hold that the first objection presented by this motion is not well taken.

The second objection alleged in the motion is, that there is in the record no bill of exceptions allowed or signed or filed within the time prescribed for filing of a bill. The objection seems to assume, judging from the argument urged in its support, that the signing of a bill which meant its allowance and its filing are contemporaneous acts. We regard them as distinct and successive. There appears in the transcript what purports to be a bill of exceptions, under the date and heading of the January term for 1877 of the district court, setting forth all the proceedings below, from the commencement of the trial to the allowance of the bill, both inclusive, these proceedings embracing the judgment and the bill signed and allowed in form. Thus the transcript explicitly states that the bill was duly allowed at that

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term and the term of the judgment. Another part of the transcript shows that the allowance must have been made as late as February 12, as on that day the motion for a new trial was decided and final judgment below rendered; but whether the allowance was made on or after that date does not appear, nor is its particular date in the term material. Enough appears to show that the bill was allowed in strict conformity with sections 300 and 303, at page 71 of the Comp. Laws. Hence the first ground of the second objection is not well taken, and the third objection, namely, that no bill of exceptions was allowed at the term of the judgment, in like manner is disposed of; this brings us to the remainder of the second objection, which relates to the filing of the bill. It appears that the term ended on February 16, and that the bill was not filed until June 20, 1877. Whether or not it was seasonably filed depends upon the construction to be given to the words "whereupon" in said section 303, which, after defining the case in which a bill of exceptions shall be presented for allowance, proceeds thus: "If true, it shall be the duty of the judge or court before whom the case was or is being tried to allow and sign it, whereupon it shall be filed with the pleadings, as a part of the record. The provision could not have intended a filing so instant with the allowance, a contemporaneous filing which would necessarily involve the idea of a statutory filing by operation of the statute.

The term "filing" in the text must mean what it means spread here in the statute, namely, an act of the clerk, and therefore an after act; and this is the more clear from the fact that under sections 300 and 303, the allowance may be made by the judge at chambers in term time or vacation where he is not usually or necessarily attended by the clerk, as he must be in open court; chamber business is constructively done at the court-house. It may actually be done anywhere within the district therefor at a point within it the remotest from the court-house; more or less of an interval must elapse between the allowance and its delivery

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to the clerk, no prejudice to the integrity of the allowance in the meantime can be anticipated, because it is in the nature of a final order and must be retained by the judge for filing; and it is to be presumed that he will transmit it to the clerk for that purpose in due course. Again, "whereupon" as it stands in the text plainly imports subsequence, this is one of its lexicographic significations, it denoting sequence, succession, order of action, relation, something done with reference to something previously done, therefore subsequence. So too "whereupon," "upon which," "after which," are interchangeable terms. Hence the filing prescribed by section 303 is to be an act subsequent to the allowance, and when made takes effect as of the allowance. Thus the term "whereupon" means in the act no more than after which, and is intended to secure a prior allowance and subsequent filing of the exceptions. But how long and subsequent? Must it be forthwith, or may it be a long time prior to sending up the record, it being essential only to laying or completing the basis of an appeal. The statute is remedial and it is our duty to give to it an enlarged, unless compelled to give to it a narrow, construction. We can see no reason why a filing at any time intermediate the allowance, and the sending up of the record is not regular, and, therefore, hold that this ground of the second objection is not well taken.

The fourth and last objection alleged in the motion is that no assignment of errors was filed on the return of the writ of error. This objection depends upon the construction of the word "upon," in section 40 and page 59 of the Comp. Laws, which section declares that "the plaintiff in error shall, upon the return of the writ, file with the record an assignment of the errors complained of." "Upon" means at the time of or after a given thing. To hold that the statute imposes upon the plaintiff in error this duty to be performed contemporaneously with the return would be to defeat the statute because such a duty would be impracticable; the writ of error as returned necessarily, reaching the

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office of the appellate clerk, before its return can be known to the plaintiff in error. To hold that the assignment must be made forthwith after the writ has so reached that office, would be to impose a duty, often difficult and burdensome, and always unnecessarily particular for the desired purpose.

Nothing in the letter or object of the statute calls for this narrow construction, and it is our duty to give to it a liberal one, and to hold, and we do hold, that the errors may be assigned within a reasonable time after the return; therefore, at any time before argument, unless the court shall, by rule, prescribe an earlier but not a forthwith assignment.

The motion to dismiss is overruled.

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APPEAL.

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2. **FROM COUNTY COMMISSIONERS.**—The statutes of Wyoming providing for appeals from decisions of the boards of county commissioners to the district court, refer only to cases first presented to such boards for adjustment and payment. *Boswell v. County Commissioners*, 235.
3. **IDEM.**—A person having a claim against a county, is not, by reason of those statutes, prevented from bringing an original action to recover the same in the district court. *Id.*
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BANKRUPTCY.

1. **BANKRUPTCY.**—Assignees of a bankrupt before they can recover of third parties for an alleged fraudulent purchase of property of the bankrupt must, upon the trial, prove all the facts necessary to bring such transaction within the provisions of the bankrupt act of the United States. This refers to the question of time as well as to all others. *North v. McDonald*, 351.
2. **IDEM.**—An employee of a United States marshal cannot sustain action against such marshal personally for services rendered in taking care of a bankrupt's estate, but should apply to the court of bankruptcy for relief. *Rumsey v. Wolcott*, 259.
3. **IDEM.**—If the marshal fraudulently refuses to pay his agent for services rendered, he (the agent) may apply to a court of bankruptcy for such relief as he may be entitled to. *Id.*
4. **IDEM.**—Where a suit was commenced by an employee of the U. S. marshal to recover compensation for taking charge of the property of a bankrupt: *Held*, that a demurrer to the petition was properly sustained, on the ground "that the court had no jurisdiction of the person of the defendant on the subject of the action." *Id.*

BILL OF EXCEPTIONS.

1. BILL OF EXCEPTIONS.—After a motion for a new trial has been made and overruled by the court below, and an exception taken thereto, such party must have his bill containing all exceptions, together with the motion for a new trial, signed or allowed by the presiding judge of the court below. *Murrin v. Ullman*, 36.
2. IDEM.—If the plaintiff in error has not proceeded in accordance with the foregoing rules, it is correct practice for the defendant in error to move the court to dismiss the proceedings in error. *Id.*
3. IDEM.—In proceedings in error the record of the court below must show that a bill of exceptions, containing the exceptions upon which the plaintiff in error relies, was duly made up and signed by the judge of said court within the time limited by statute. *Geer v. Murrin*, 37.
4. IDEM.—After a motion for a new trial has been made and overruled by the court below and an exception taken thereto, such party must have his bill containing all exceptions upon which he relies, together with the motion for a new trial, signed or allowed by the presiding judge of the court below. *Id.*
5. IDEM.—If the plaintiff in error has not proceeded in accordance with the foregoing rules, it is the correct practice for the defendant in error to move the court to dismiss the proceedings in error. *Id.*

BREACH OF CONTRACT.

BREACH OF CONTRACT—LIQUIDATED DAMAGES.—In a contract for the transportation of freight, it was provided "that in the event of either of the parties failing to comply with the terms of the contract, the party so failing was to pay the other party the sum of one thousand dollars, fixed and settled damages:" *Held*, that this was not intended, nor to be construed as meaning a penal sum; but as fixed, settled and liquidated damages, and the defendant was not permitted to show that the plaintiff had not sustained actual damages to that amount. *Iverson & Co. v. Althrop*, 71.

CHALLENGING JURORS.

CHALLENGING JURORS.—Where the statutes prescribe fully and distinctly the qualifications of jurors and the points upon which they may be interrogated by counsel, questions as to entirely different matters are not permissible. *Kinsler v. Territory*, 112.

CHANCERY PRACTICE.

1. CHANCERY.—Where a bill of complaint in chancery showed upon its face that complainant had a remedy at common law: *Held*, that the court erred in not sustaining a general demurrer to the bill. *Iverson v. Hutton*, 178.
2. IDEM.—Striking out certain words from the original bill of complaint, especially where it is not again verified, is not an amendment of such bill. *Id.*
3. IDEM.—Neither is it such an alteration or amendment as could change

the jurisdiction from a court of common law to a court of chancery.
Id.

4. *IDEM.*—If a demurrer is sustained to a bill of complaint, and complainant, by permission of the court, amends the bill, the court has no power to limit the defendant's time to answer. That is fixed by law. *Id.*

CHANGE OF VENUE.

CHANGE OF VENUE.—It is the duty of the district court, upon the trial of a criminal cause, where the proper affidavit as to the bias or prejudice of the judge is filed in time, to call in another judge to preside at such trial. The statute in reference thereto is mandatory and imperative, and upon an application properly made, it is error for the court to refuse, and such error is sufficient to obtain a reversal of the judgment. *Hamilton v. Territory*, 131.

CHARGE TO JURY.

1. **CHARGE TO THE JURY—VERDICT.**—Courts will not interfere with the verdict, because such verdict does not accord with the exact views of the case taken by the court, of the preponderance of evidence, or that the court would have arrived at a different conclusion from that of the jury. *Breenan v. Heenan*, 121.
2. *IDEM.*—Even if an erroneous charge to the jury has been given, the verdict will not be disturbed if it clearly appears that no injustice has been done, or that the jury have not been misled thereby in the finding of such verdict. *Id.*

CHARGE OF COURT.

CHARGE OF THE COURT.—Malice may be presumed against the defendant on trial in a criminal action to such an extent that it will, under certain circumstances, shift the burden of proof from the prosecution to the defense upon that particular question. *Fein v. Territory*, 380.

CITY WARRANTS.

CITY WARRANTS.—The board of trustees or managing officers of a municipal corporation may issue warrants upon the treasury, to be used as evidences of indebtedness, although there is no money in the municipal treasury at the time, and although not specially authorized so to do by the city charter, under which they were proceeding. *Itinson v. Hance*, 270.

COMPOUNDING FELONIES.

COMPOUNDING FELONIES.—Neither a justice of the peace, prosecuting witness, nor prosecuting attorney, possesses the power to compromise felonies. *Itinson v. Pease*, 277.

CONSTRUCTION OF STATUTES.

CONSTRUCTION OF STATUTES.—A law passed either restricting the time of the commencement of an action or proceedings in an appellate court should be liberally construed and should take effect from the date of its passage. It should not be construed as retroactive, but as applying to future causes, and the courts should not permit it to injure the rights of involuntary and innocent parties. The approved rule is "that the new statute affects only cases which arise after it takes effect, leaving old cases subject to the old, new cases subject to the new act." *Lee v. Cook*, 417.

CONTEMPT.

1. CONTEMPT.—At common law proceedings for contempt cannot be reviewed by a court of errors. *Wilson v. Territory*, 114.
2. IDEM.—The legislature only can give a defendant in such proceedings the right to appeal or to a writ of error. *Id.*
3. IDEM.—Where in such a case a writ of error was improperly sued out, a motion to dismiss the proceedings in error was sustained. *Id.*
4. IDEM.—In proceedings against a party for constructive contempt an attachment warrant or alternative order to show cause against the person of the defendant cannot be issued until the proper affidavit has been filed to give the court jurisdiction. *Wilson v. Territory*, 155.
5. IDEM.—Where an attachment was issued without such affidavit: *Held*, that it was an error which could not be cured by the subsequent filing of an affidavit. *Id.*

CONTRIBUTION.

1. CONTRIBUTION—COUNTY LIABILITIES.—The rule is well established, that where a county has been divided by an act of the legislature, one portion thereof retaining the former name, county seat, buildings and organization, and all county property, that such county is responsible for the entire indebtedness of the former county at the time of such division, and that an action will not lie against the new counties for contributions, unless special provision is made therefore by the legislature in the act itself. *Co. Commrs. v. Co. Commrs.* 137.
2. IDEM.—Where the legislature of Wyoming territory organized two new counties, and included within their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities: *Held*, that the old county, being solely responsible for the debts and liabilities it had previously incurred, had, on discharging them, no claim upon the new counties for contribution. *Id.*

COUNTER-CLAIM.

1. COUNTER-CLAIM.—A counter claim set up by the defendants in an action can only be maintained where it exists in favor of all the de-

defendants against the plaintiffs, and each and every of them. *Great West. Ins. Co. v. Pierce*, 45.

2. *IDEM.*—"Where a note is on its face joint or joint and several, it is conceived that evidence to show that one maker is surety for the other is inadmissible at law if the question arises between the creditor and the surety; but evidence to that effect has been received when the question arises between the principal debtor and the sureties." *Id.*
3. *IDEM.*—"As between the makers of a promissory note and the holders, all are alike liable, all are principals; but as between themselves, their rights depend upon other questions." *Id.*
4. *IDEM.*—A counter-claim cannot be maintained by one alone of several defendants, who are all joint and several makers of a promissory note, against the holder and payee, although such defendant offer to prove that he alone is the principal, and the other defendants simply sureties. *Id.*

CRIMINAL PRACTICE.

CRIMINAL PRACTICE EVIDENCE—NEW TRIAL.—In proceedings in error in a criminal case to obtain the review of the orders, rulings and decisions of the lower court, and one of the errors assigned being: "That the verdict is not sustained by sufficient evidence and is contrary to law," the record must show all the evidence to enable this court to pass upon the question. *Phillips v. Territory*, 82.

CRIMINAL PROCEDURE.

CRIMINAL PROCEDURE.—An indictment having been found against the plaintiff in error under the section of the U. S. statutes which provides: "And any brewer who shall neglect to keep books, * * * shall for every such neglect forfeit and pay the sum of three hundred dollars:" *Held*, on the hearing of the cause in this court, that the prosecution should have proceeded by civil action, and not by indictment. *Fein v. U. S.*, 246.

CUSTOM.

1. *CUSTOM—USAGE.*—The general custom or rules of a railroad company, or of various companies, cannot affect a special contract or modify the same, where such contract contains no ambiguity of terms. *Martin v. U. P. R. R. Co.*, 143.
2. *IDEM.*—Neither is proof of such general custom or usage permissible, unless it is also shown that such has been so in the dealings of such companies with outside parties, they understanding and consenting thereto. *Id.*
3. *IDEM.*—It must be a general usage between the company and those who contract with it. *Id.*
4. *IDEM.*—While the freight books of a company may be used to refresh the memory of a witness who has made entries in them, such books in themselves are no evidence, and were properly excluded. *Id.*

DAMAGES.

1. DAMAGES, RAILROAD COMPANIES.—A railroad company is not responsible in damages to a person injured by an accident to a train passing over a portion of the road not completed, when said train is solely under the charge of the contractors building the road, and receiving all the profits thereof, that portion of the road being still unaccepted by the company. If any one is liable for damages it is the contractors and not the railroad company. *U. P. R. R. Co. v. House*, 27.
2. IDEM.—Where suits are brought for injuries arising from accidents on railroads, exemplary, punitive or vindictive damages should not be awarded, except in extreme cases. The general rule is, that sufficient damages should be given to fully compensate the plaintiff for his loss of time and suffering. *Id.*

DEMURRER.

1. DEMURRER.—Where a petition upon its face shows that the claim upon which the action is brought is barred by the statute of limitations, or that a plea of that statute may be successfully interposed, a demurrer to the petition on that ground should be sustained. *Bonnifield v. Price*, 172.
2. IDEM.—Where the demurrer is sustained or overruled, it lies solely in the discretion of the court whether or not to permit either party to amend his pleadings. *Id.*
3. IDEM.—Where a demurrer in one action was sustained to the plaintiff's petition, for the reason that it appeared from the face of the petition that the cause of action was barred by the statute of limitations, and a second action was commenced for the same cause of action, but with the petition so drawn as not to raise upon its face the question of the statute of limitations: *Held*, that the judgment upon the demurrer in the first suit was no bar to the second proceeding. *Bonnifield v. Price*, 233.
4. IDEM.—Where the defendant's demurrer has been overruled, a reasonable time will be given him to answer, unless it appear that such demurrer was interposed in bad faith; but such time to answer will not be extended, except for causes over which the defendant could have had no control. *Martin et al. v. Moore*, 22.
5. IDEM.—The matter lies entirely within the discretion of the court. *Id.*

EJECTMENT.

EJECTMENT.—Under the statutes of Wyoming territory it is not necessary that the plaintiff is the owner of the real estate in question in fee-simple absolute. It is sufficient if he is entitled to the legal or equitable estate therein. *Freeman v. Crout*, 364.

ESTOPPEL.

ESTOPPEL.—PLEA IN BAR.—Defendant in error sired the plaintiff in error for one year's rent of certain real estate. Upon the trial it

appeared that the year had not expired, and that only a portion of the rent was due, and the court ordered judgment for that amount only. Suit was subsequently commenced between the same parties for the remainder: *Held*, that the judgment in the first case, although the petition therein prayed for all the rent, was no bar to the prosecution of the second suit. *Bath v. Lindermeyer*, 240.

EVIDENCE.

1. EVIDENCE—VERDICT.—If there is evidence before a jury tending to prove the material allegations of the complaint, and sufficient facts to establish the cause of action, the verdict should be sustained, unless it appears to the appellate court that the jury has either misunderstood the evidence or that the jurors have been influenced by bias or prejudice. Where there is no evidence, however, to sustain the verdict, or where it has been found directly contrary to the evidence, it should be set aside and a new trial granted. *W. U. T. Co. v. Monseau*, 17.
2. IDEM.—The best evidence which the nature of the case will admit of, and which can be obtained by the party, should be adduced. *McGlinchey v. Morrison*, 105.
3. IDEM.—Secondary evidence should never be admitted, except where it is impossible to procure testimony of a higher and better character. *Id.*
4. IDEM.—A copy of an execution, under which goods have been levied upon, made from memory, although verified, is inadmissible. *Id.*
5. ATTACHMENT.—Where certain parties attached the goods of W. as the property of W. & Co., and W. replevied such property on the ground that he was not a member of such firm: *Held*, that on the trial of the suit in replevin, the evidence of the statements on various occasions by the plaintiff W., that he was a member of such firm, was admissible; and that the exclusion by the court of such testimony was a fatal error. *Carr v. Wright*, 157.
6. IDEM.—An affidavit made in the action by a witness on a former occasion, simply showing contradictory statements, cannot be introduced as evidence on the cross-examination of such witness, except for the purpose of impeachment. *Dayton v. Bank*, 263.
7. IDEM.—To impeach the testimony of a witness in that manner, it is necessary to call the attention of the witness to his previous statements, by definitely fixing time, place and circumstances. *Id.*
8. REPLEVIN.—Where a sheriff was sued in replevin for property taken by him as such sheriff, under certain writs of attachment: *Held*, that it was unnecessary for him to prove on the defense that he was in every respect the qualified sheriff of the county; it was sufficient to prove that he was the sheriff *de facto* of such county. *Id.*
9. IDEM.—Nor that it was necessary for him to prove, in order to establish his right to hold the property under such writs, that the attachments were issued on valid and *bona fide* claims. *Id.*
10. IDEM.—The sheriff need not go behind the face of the papers. If

- they have been issued in due form from a court of competent jurisdiction, he will be protected. *Id.*
11. **IDEM.**—The plaintiff in a suit in replevin must prove the ownership, in a right of possession to the property, by a preponderance of evidence. *Id.*
 12. **IDEM.**—He cannot make out his case by attacking the defendant's title. *Id.*
 13. **IDEM.**—Although, upon a trial of a cause, immaterial evidence is admitted to the jury, the court of errors will not reverse the judgment, unless it clearly appears that the opposite party has been prejudiced or injured thereby. *Alsop v. Hutton*, 285.
 14. **NEW TRIAL.**—The court will not set aside a verdict and grant a new trial upon the sole ground that the verdict is not sustained by sufficient evidence, unless it is manifest that the jury acted in a total disregard of the evidence, or acted against the great weight of the evidence to such an extent as to show that the verdict was the result of improper motives. *Bank v. Dayton*, 339.
 15. **PREPONDERANCE OF.**—It is the province of a jury, and of the court in the absence of a jury, to determine upon which side of the case the weight or preponderance of evidence is found; and it must be shown affirmatively by the plaintiff in error that the verdict was contrary to the evidence, or was not sustained by sufficient evidence, or was contrary to law, before this court will interfere. *Byrne v. Myers*, 355.
 16. **IDEM.**—A deed or conveyance executed in another territory or state according to the laws of that territory or state, of lands in Wyoming, is executed according to the laws of Wyoming, if pertinent and relevant, should be admitted in evidence, and it is error for the court to refuse testimony tending to prove what the law is in reference thereto in such other state or territory. *Freeman v. Crout*, 364.
 17. **BOOKS OF ACCOUNT.**—Where a witness testified of his own knowledge that goods were delivered, and that the entries therefor were made at the same time by his clerks in his books of account: *Held*, that the delivery and charges being contemporaneous, it was immaterial whether the testimony of such clerks was introduced or not, as their testimony would only go to the weight of the evidence. *Dear v. Tracy*, 393.
 18. **IDEM.**—Although an error was committed by the district court in admitting certain documentary evidence, yet where it clearly appears from the record that the jury could not have been misled thereby, the judgment of the court below should not be reversed on that ground. *Hilliard Flume and Lumber Co. v. Woods*, 400.

FEES.

FEES.—A county treasurer, under the statute of Wyoming, is not entitled to a percentage for paying over at the expiration of his term to his successor the funds of the county then remaining in his hands as such treasurer. He should only receive a percentage on the

money paid out by him while performing the ordinary duties of his office. *Pease v. Territory*, 396.

FOREIGN JUDGMENTS.

FOREIGN JUDGMENTS—PLEADING.—In an action upon a foreign judgment, an allegation in the complaint is sufficient if it states the name of the court in which such judgment was obtained, and that the same was a court of competent jurisdiction, without alleging the actions and proceedings thereof. *Martin et al. v. Moore*, 22.

INDICTMENT.

1. **INDICTMENT—PROOF.**—It is immaterial what date is alleged in an indictment as the day on which a crime was committed, provided such day be prior to the finding of the indictment and within the time prescribed by the statute of limitations. *Fields v. Territory*, 78.
2. **IDEM.**—But the rule as to proof under an indictment is not so liberal as it must be confined to a given crime and to a given time. *Id.*
3. **IDEM.**—The prosecution on a trial under an indictment so drawn that it might cover a dozen different offenses of the same nature, after examining the first witness as to one offense on a day certain, must confine its proof to that particular offense, and the admission by the court of evidence tending to prove other offenses is error. *Id.*
4. **IDEM.**—Evidence of a distinct substantive offense cannot be admitted to aid in proving the commission of another offense. *Id.*
5. **CHARGE OF COURT.**—Under the statutes of the territory of Wyoming, upon the trial of an indictment for murder in the first degree, it is not erroneous for the court to instruct the jury "that if they find from the evidence that the homicide was perpetrated purposely and maliciously, but without deliberation and premeditation, they might and should find the defendant guilty of murder in the second degree." *Phillips v. The Territory*, 82.
6. **IDEM.**—A conviction will not be disturbed, unless there be a decided preponderance of evidence in favor of the prisoner. *Id.*
7. **IDEM.**—A defendant in a criminal action cannot claim a new trial on the ground that the jury found him guilty of a lesser grade of the offense charged in the indictment than the evidence warranted. *Id.*
8. **ALLEGATIONS.**—An indictment for an offense prohibited by statute must allege sufficient facts to bring the offense within the provisions of that special statute. A general allegation at the close of the indictment to the effect that the defendant "was then and there unlawfully and corruptly guilty of malfeasance," is not sufficient. *McCarthy v. Territory*, 313.
9. **TERMS USED.**—Under an indictment for willfully, maliciously, etc., killing a horse: *Held*, that testimony tending to prove the killing of a gelding was properly admitted. *Fein v. Territory*, 380.

INDORSEMENT.

INDORSEMENT.—Where a joint and several note made by the three defendants to the order of plaintiff and another party, was by that party indorsed and transferred to the plaintiff: *Held*, that the plaintiff alone could bring suit on the note, and that the district court did not err in overruling a demurrer to plaintiff's petition, on the ground that "there was a defect of parties plaintiff." *Regan v. Jones*, 210.

INJUNCTION.

INJUNCTION—COLLECTION OF TAXES.—Where the collection of illegal taxes against a railroad company may work an irreparable injury, an injunction against the collector and other county officials will be granted. *U. P. R. R. Co. v. Carr et al.*, 96.

INSTRUCTIONS TO JURY.

INSTRUCTIONS TO JURY.—While the district court may have erred in refusing to give to the jury a certain instruction requested by defendant, as to the form of their verdict, if they found for the defendant in an action for replevin, yet if the jury find for the plaintiff, the defendant cannot be injured by the refusal of the court to give such instruction, and the judgment should not be interfered with. *Alsop v. Hutton*, 285.

JURISDICTION.

1. **JURISDICTION OF THE UNITED STATES.**—Under the provisions of the organic act of the territory of Wyoming, the United States has exclusive jurisdiction over the forts and military reservations thereof. The federal judges of the territory, sitting with the powers of circuit and district judges of the United States, are empowered to try all offenses committed on such reservations, against the laws of the United States. *Scott v. United States*, 40.
2. **UNITED STATES COURTS.**—Military reservations within the territory of Wyoming are solely under the jurisdiction of the United States. *Brown v. Ilges*, 202.
3. **IDEM.**—Where stock was roaming over a reservation, contrary to the provisions of the general orders of the commanding officer, and such stock was seized by a subordinate officer of the United States, in accordance with such general orders: *Held*, 1. That such commanding officer had the authority to make and enforce the general orders; 2. That the owner of such stock could not maintain a civil action for damages against the subordinate officer who executed the general orders. *Id.*
4. **IDEM.**—A party will not be heard to allege error which, if it exists at all, is in his own favor. *Id.*
5. **JUSTICES OF THE PEACE.**—The organic act of Wyoming territory provides that justices of the peace may have jurisdiction in civil and

criminal cases not involving titles to lands or cases of felony, where the amount claimed or the penalty fixed does not exceed one hundred dollars, and as limited by law. *Wolcott v. Territory*, 67.

6. *IDEM.*—There is no limit to the penalty for the crime of assault and battery. *Id.*
7. *IDEM.*—Hence justices of the peace have no jurisdiction of the offense, nor to hear, try and determine the same, but upon the charge would sit only, and have authority as committing magistrates. *Id.*
8. APPELLATE COURTS—WEIGHT OF EVIDENCE.—The supreme court should not reverse a judgment of a lower court because it might or would have arrived at a different conclusion upon the evidence adduced. The appellate court should only reverse where there is no testimony to sustain or rebut a material allegation, or where it is apparent that the jury have been controlled by improper motives, or have misunderstood the evidence. *Hilliard Flume & L. Co. v. Woods*, 400.

LEGISLATIVE PROCEEDINGS.

LEGISLATIVE PROCEEDINGS—PASSAGE OF BILLS.—Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon the evidence and judge the statute void. *Brown v. Nash*, 85.

LEGISLATIVE POWERS.

LEGISLATIVE POWERS—MUNICIPAL CORPORATIONS.—The legislative assemblies of Wyoming and other territories, although not in possession of sovereign powers, have authority under various acts of congress to create municipal corporations, and to grant charters to the same. *Wagner v. Harris*, 194.

MANDAMUS.

1. MANDAMUS—CONFLICT OF LAWS.—Where statutes, otherwise of equal validity, conflict, the greater force should be given to the one tending to the best interests of the commonwealth, and to the enforcement of the laws. *Donnellan v. Nicholls*, 61.
2. *IDEM.*—Where one law provides that no moneys shall be paid out of the territorial treasury, unless especially appropriated by the legislature, and another law provides for the proper custody and maintenance of convicted criminals, but no appropriation having been made for the purpose, a writ of mandamus will issue to compel the territorial auditor to audit the proper account for the same, and to compel the treasurer of the territory either to pay such account when audited, or to certify that there are no funds in the treasury wherewith to pay the same. *Id.*

3. **IDEM.**—Where the county superintendent of public schools refuses to pay over money belonging to any district, or to make the proper order for the application of such money, the proper proceeding of the party aggrieved is by writ of mandamus. *Brown v. Nash*, 85.

MEASURE OF DAMAGES.

MEASURE OF DAMAGES.—Where certain railroad ties of plaintiff had been wrongfully converted and sold by defendant: *Held*, that plaintiff was entitled to recover the highest market price for the same that was paid at any time between conversion and judgment. *Hilliard F. & L. Co. v. Woods*, 400.

MOTION FOR NEW TRIAL.

1. **MOTION FOR NEW TRIAL.**—It is now a well-settled doctrine on that subject that before a party can bring a case into the supreme court from a district court, he must first have made his motion for a new trial in that court in writing and assigned his reason therefor. *Wilson v. O'Brien*, 42.
2. **IDEM.**—A motion for a new trial must be interposed within three days after the verdict is rendered. *Id.*
3. **IDEM.**—The district court must first have the opportunity to review the errors complained of, which must be assigned in such motion before the party complaining can bring the case to the supreme court for review. *Id.*

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—PERSONAL PROPERTY.—Village lots to which no title has been derived from the United States are not property that should be assessed, but improvements thereon may be assessed as personal property. *Iverson v. Hance*, 270.

NATIONAL BANKS.

1. **NATIONAL BANKS—POWERS OF AGENTS.**—Money paid to the cashier of a bank for the use of and benefit of the bank, is payment to the bank itself. If such cashier misapply the funds so received, the bank, as his principal, can maintain an action against him, but not the person paying the money. *Wilson v. Rogers*, 51.
2. **IDEM.**—If the latter suffer injury by reason of such misapplication, his remedy lies against the bank and not against its officer or servant. *Id.*
3. **IDEM.**—An agent receiving money from a third person for his principal, if he acted within the scope of his authority, and has the right to receive such payment, is not responsible to the third person; payment to the agent is payment to the principal, who is responsible for the default of the agent. *Id.*
4. **NATIONAL BANK STOCKHOLDER.**—The stockholder of a national bank has legal capacity to sue such corporation for misappropriation.

- tion of the stockholder's funds, and for other causes. *Wilson v. First National Bank*, 108.
5. *IDEM*.—A corporation being a legal entity, as such, distinct from its members, incorporators, or stockholders, it follows that each or all of them may have grievances redressed by actions at law or proceedings in chancery, as any creditor not occupying that relation. *Id.*

NEW TRIAL.

NEW TRIAL.—A motion for a new trial will not be granted where two verdicts for the same party have already been rendered, the second for a larger amount than the first, where the amount involved is small, and where there is no probability that a verdict materially different would be arrived at by a jury, unless very great and manifest injustice has been done. *Emery v. Hawley*, 305.

NONSUIT.

NONSUIT.—Where assignees of a bankrupt brought suit to recover the value of certain property purchased of him on an alleged fraudulent sale, and on the trial failed to prove that such sale and the filing of the petition in bankruptcy occurred within two months' time of each other, according to the provisions of section 5128 of the bankrupt act, but on the contrary did prove that two months and twenty-three days had elapsed between the occurrence of the alleged fraudulent purchase and the filing of the petition in bankruptcy: *Held*, that it was not only right for, but the duty of, the district court, on motion of defendants, to grant a nonsuit. *North v. McDonald*, 351.

OFFICIAL BONDS.

OFFICIAL BONDS—LIABILITY OF SURETIES.—Under the statutes of the territory of Wyoming, which provide that the judges of probate of the respective counties shall be *ex officio* county treasurers of the same, an undertaking given for the faithful performance, etc., of the duties of probate judge is not an undertaking for such performance of duties of county treasurer by the same person, and the sureties on the bond for the former are not liable for the defaults and malfeasance of such probate judge while acting as county treasurer. To make a person an *ex officio* officer, by virtue of his holding another office, does not merge the two into one. *Territory v. Ritter*, 321.

POWER OF COUNTY OFFICERS.

1. **POWER OF COUNTY OFFICERS.**—In the Territory of Wyoming, where a question arises as to the line between different counties and the assessment of property upon the territory in dispute, the board of county commissioners or the board of equalization of either of the counties interested, is not a proper or competent tribunal to decide

- in which county a person or corporation shall pay taxes. *U. P. R. R. Co. v. Carr*, 96.
2. *IDEM*.—Under such circumstances an application by bill of complaint by the taxpayer to a court of chancery, for an order that the parties in interest interplead, and for a perpetual injunction against those in error, is a proper course. *Id.*
 3. *VETO*.—In order to pass a bill in the legislature over the governor's veto, the bill must receive two thirds of the votes of the members actually present; two thirds of those voting is not sufficient if other members are present. *Id.*

PRACTICE.

1. *PRACTICE—APPEAL*.—An appeal must be perfected to entitle the appellant either to a stay of proceedings, or to a hearing on the appeal. Serving notice of appeal, and also filing in addition thereto a bond on appeal is insufficient unless the record has been properly taken to the appellate court. If the appeal has not been perfected the course for the appellee to pursue is by motion to dismiss the appeal. *Launier v. Haase*, 25.
2. *APPEAL—WRIT OF ERROR*.—Where a code of civil procedure allows a party to carry proceedings for review to the supreme court, either by appeal or writ of error, he must decide upon which course he will rely. After having attempted to reach the supreme court by appeal, and having failed therein by reason of not perfecting the same in filing the undertaking required by statute, it is then too late for him to resort to another remedy, and to attempt to have the proceedings of the district court reviewed by means of a writ of error or petition in error. *Horton v. Peacock*, 57.
3. *CRIMINAL CASES*.—The provisions of the statutes, that in criminal cases the plea of the defendant shall be entered by the clerk of the court upon the indictment, is simply directory, not mandatory. *Territory v. Anderson*, 20.
4. *IDEM*.—A failure so to do, unless the defendant is by some means misled thereby, is not a fatal error, or one to justify a reversal. *Id.*
5. *IDEM*.—A statute requiring that in cases of misdemeanor the name of the prosecuting, or other witness, shall be indorsed on the indictment, is merely directory, and not mandatory. *Id.*
6. *IDEM—ARREST OF JUDGMENT*.—A motion in arrest of judgment can only reach defects apparent in the record. *Territory v. Pierce*, 168.
7. *IDEM*.—Where the question raised as to a defect in the jurisdiction of the court did not appear in the record: *Held*, that a motion in arrest of judgment was improperly sustained. *Id.*
8. *IDEM*.—No defect in evidence can be urged for an arrest of judgment. *Id.*
9. *DEPOSITIONS*.—A motion to suppress depositions should embrace and set forth all the objections thereto. *Carr v. Wright*, 157.
10. *IDEM*.—Part of the exceptions cannot be raised and argued at one time and part at another. *Id.*

11. **IDEM.**—The argument of a motion to suppress depositions must be made before the trial commences. *Id.*
12. **APPEAL.**—If an error is committed by the supreme court of the territory, the party believing he has sustained injury thereby has, of course, his right to appeal to the supreme court of the United States; but for an alleged error in judgment of the court a party cannot have a former decision of the court reversed on a mere motion. *Bonnifield v. Price*, 245.
13. **IDEM.**—A motion to vacate a former decision will not be granted if it is founded upon some question which was raised or could have been raised on the argument of the case. *Id.*
14. **PRACTICE.**—An application for change of judge, under the provisions of the statutes of the territory of Wyoming, must be made in the cause before it is definitely set for trial. *Dolan v. Church*, 187.
15. **IDEM.**—Where the application was made after both parties had consented in open court that the trial of the cause should be set down for a day certain: *Held*, that it was too late to make such application, and that the moving party had waived his rights therein. *Id.*
16. **IDEM.**—In order to have an error considered by the supreme court it must be properly assigned as an error, and presented on a motion for a new trial in the court below. *Id.*
17. **IDEM.**—Under the provisions of the code of procedure in the territory of Wyoming, all objections, except those for incompetency and irrelevancy, must be raised by motion before the commencement of the trial. *Hellman v. Wright*, 190.
18. **IDEM.**—Objections, however, for the two reasons mentioned, should be made on the trial, and the fact that the court has previously refused to suppress such depositions on motion is no bar to the question being again raised as to their incompetency and irrelevancy. *Id.*
19. **IDEM.**—Where the plaintiff had introduced his evidence and had rested, but subsequently offered the statutes of Nebraska in evidence: *Held*, that the admission of the same, or of other testimony, was entirely at the discretion of the court, and that the refusal to admit further evidence at that time was no error. *Id.*
20. **IDEM.**—Under the code of procedure of Wyoming territory, an action in which the city of Cheyenne, a municipal corporation, prosecutes as plaintiff to recover a fine or penalty, under the ordinances of the city, is a "civil action." *Jenkins v. City of Cheyenne*, 289.
21. **APPEAL FROM JUSTICES' COURTS.**—In taking an appeal from the judgment of a court of a justice of the peace, the requirements of the statute must be strictly and literally complied with as to the affidavit and undertaking by the appellant, or his appeal will on motion be stricken from the docket of the appellate court. *Id.*
22. **IDEM.**—The statutes of Wyoming prescribe how a judgment of the court of a justice of the peace may be reversed. The law must be strictly followed, or the appellate court will not obtain jurisdiction. No other proceedings can give jurisdiction. *Leism v. Pease*, 277.

23. PROCEEDINGS IN ERROR.—The mere filing of the statutory undertaking in the district court by the plaintiff in error, will not stay proceedings in that court. All the proceedings necessary to take the case to the supreme court must be perfected, and it is only when that is done that the undertaking will act as a supersedeas. *Glafcke v. O'Brien*, 317.
24. IDEM.—It is the well established and invariable rule of the supreme court, that in proceedings before it in error, the record or transcript must contain all the material evidence given in the court below, and bearing upon any question relied upon by the plaintiff in error. *Ivinson v. Alsop*, 251.
25. MOTION FOR NEW TRIAL.—The record must also show that a motion for a new trial was made in the court below, raising all matters of errors and exceptions (upon which the plaintiffs in error relied), and the motion overruled. *Id.*
26. IDEM.—The evidence and motion for a new trial must be contained in the bill of exceptions. The bill must be signed within the time limited by law. The defect cannot be remedied and a motion to strike the petition in error from the files and to affirm the judgment of the district court will be sustained. *Id.*
27. WRITS OF ERROR.—Under the provisions of the Wyoming code of procedure and the rules of practice established by the supreme court, parties intending to have the case reviewed in the supreme court, either by writ of error or petition in error, must, upon the trial, make his objections clearly and distinctly, briefly stating the grounds thereof. If overruled, an exception must be noted then and there. *Murrin v. Ullman*, 36.
28. PRACTICE—PROCEEDINGS IN ERROR.—If the plaintiff in error fail to comply with the rules of the supreme court in having the record prepared as prescribed by such rules, the proceedings in error will be dismissed and a writ of *procedendo* awarded. *Jenkins v. Territory*, 318.
29. REVIVOR.—The statutes of Wyoming provide that the order of revivor in case of the death of a party shall be served and returned the same as a summons. A different method having been followed: *Held*, that the statutes must be strictly and literally complied with. *Wolcott v. Fee*, 255.
30. PROCEEDINGS IN ERROR.—In commencing proceedings in error the provisions of the statute must be strictly complied with. Thus, where the statutes require absolutely that a bond or undertaking for suits, etc., be given by plaintiff in error, and he fails so to do, his proceedings will, on motion, be dismissed. *Horton v. Peacock*, 39.
31. PROCEEDINGS IN ERROR—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL.—The plaintiff in error must incorporate his motion for a new trial in the bill of exceptions, and thus have it made part of the record, otherwise the proceedings in error, on motion, will be dis-

missed, and the judgment of the lower court affirmed. *Co. Commrs. v. Hinton*, 358.

32. PROCEEDINGS IN ERROR.—A party to have errors complained of, reviewed by the supreme court, must have his bill, containing all exceptions upon which he relies, together with the motion for a new trial, signed or allowed by the presiding judge of the court below. *White v. Sisson et al.*, 399,

REFEREE.

1. REFEREE.—Under the provisions of the statutes of Wyoming, the court may order a reference in a case the trial of which involves the examination of a long account. *U. P. R. R. Co. v. Wilson*, 309.
2. IDEM.—But where the report of a referee is not responsive to the issues, the case should be sent back for trial to a new referee, or to a jury, and not to the first referee. *Id.*

REPLEVIN.

1. REPLEVIN.—Where, in an action of replevin, the court refused under the pleadings to permit the defendant to prove title to the property, but permitted the defendant to so amend his answer that the court might admit such evidence: *Held*, that the court did not err in so doing. *Gregory v. Morris*, 213.
2. IDEM.—The right of possession merely is sufficient to enable a party to maintain an action of replevin. *Id.*
3. IDEM.—In a contract between vendor and vendee, which contained a clause to the effect that the right of property should remain in the vendor, with the right to seize the same at any time until the vendee should have complied with the terms of the contract: *Held* that such clause was valid as between parties, and that an action in replevin could be maintained by the vendor, although possession had been given to the vendee. *Id.*
4. IDEM.—Although a general verdict in an action of replevin is not strictly in accordance with the provisions of the code of procedure, yet it is not such an error as to justify the interference of an appellate court, unless it is shown that the plaintiff in error sustained injury thereby. *Id.*
5. IDEM.—Where the plaintiff in a suit in replevin failed to prove on trial the material allegations of his petition, and the court, on motion of defendant, ordered a non-suit: *Held*, that the granting of such order was not erroneous. *Bath v. Ingersoll*, 281.
6. IDEM.—The defendant in an action of replevin, having obtained against the plaintiff an order of nonsuit, may proceed to impanel a new jury in the same cause, and to assess the defendant's damages. *Id.*

SENTENCE.

1. SENTENCE.—Where a defendant under an indictment for felony has been irregularly sentenced, the proper course is to again pass sentence upon him in due form. *Kinsler v. Territory*, 112.

2. *IDEM*.—If the court fails to interrogate the prisoner, before passing sentence, as to whether he has anything to say why sentence should not be passed upon him, such failure furnishes no ground for a reversal of judgment, especially as the supreme court must impose the sentence *de novo*. *Id.*

SHERIFFS' FEES.

SHERIFFS' FEES.—Under the laws of Wyoming for 1869 the allowance to the sheriffs of the respective counties, of one dollar per day for the custody and subsistence of prisoners, is one of the perquisites of the office, as well as a remuneration for services rendered and articles furnished, and county commissioners have no power to deprive a sheriff of the same. *Co. Comrs. v. Boswell* 294.

STATUTE OF LIMITATIONS.

STATUTE OF LIMITATIONS.—While the statute of limitations of Wyoming territory provides that a cause of action, barred by the statute of the state or territory in which it arose, is also barred in Wyoming, yet if it conclusively appears to the court that the defendant has been for such a length of time absent from such state, where the cause of action originated, as to prevent the statute of limitations running there, such absence will also prevent the statute running here, and the court should so hold. *Bonnifield v. Price*, 223.

STRANGER TO CONTRACT.

STRANGER TO CONTRACT.—It is well settled that in no case can a stranger to a contract maintain an action upon it or for the breach of it, save in the exceptional cases where a promisee was considered merely the agent of the stranger, and where the stranger was regarded as the trustee of the party to whom the promise is made. *McCarteney v. Bank*, 386.

SURETIES.

SURETIES.—Though at common law the discharge of one surety to a bond or undertaking may discharge all, a court of chancery may interfere, and see that material justice is meted out to all parties. *Trabing v. County Comrs.*, 302.

VERDICT.

1. **VERDICT—FORM OF.**—Where a verdict is returned in writing by a jury, it should at least show clearly upon its face precisely what the jury intended to find. It should state for which of the parties to the action the jury finds, and also against which one, where there are more than one of either plaintiffs or defendants. *Great Western Ins. Co. v. Pierce*, 45.
2. *IDEM*.—A verdict in the following form held to be sufficient: "We, the jury, find a verdict for H. A. Pierce for the sum of one thousand one hundred and fifty-eight dollars and five cents. A. P. Post, Foreman." *Id.*

3. *IDEM.*—Under the statutes of Wyoming territory, for the year 1869, and in force in 1872 and 1873, it was the duty of the jury in criminal cases where a verdict of guilty was found, and not of the court, to fix the term of imprisonment or to assess the amount of fine. *Hamilton v. Territory*, 131.
4. *IDEM.*—This rule applied to misdemeanors as well as to felonies. *Id.*
5. *NEW TRIAL.*—A verdict will not be set aside, nor a new trial ordered, if it is apparent that substantial justice has been rendered, especially if it is also evident that another jury would not materially vary the findings of the first. *Nagle v. Rutledge*, 361.

VESTED RIGHTS.

VESTED RIGHTS.—Even where the legislature so changed the boundaries of counties that a school district formerly belonging to one is subsequently embraced in the other county, if school moneys have, prior to the passage of such act, become due from the former county to such district, said district has a vested right therein, and a writ of mandamus will lie to compel the payment thereof. *Brown v. Nash*, 85.

VETO.

VETO.—In order to pass a bill in the legislature over the governor's veto, the bill must receive two thirds of the votes of the members actually present. Two thirds of those voting are not sufficient, if other members are present. *Brown v. Nash*, 85.

WORK, LABOR AND SERVICES.

WORK, LABOR AND SERVICES.—The court below having charged the jury that if defendant hired plaintiff for one month at a stipulated sum, and discharged him before the expiration of the month without sufficient cause, defendant was bound to pay plaintiff for the full month, or that if defendant discharged plaintiff before the time agreed upon had expired, at a great distance from home and in an uninhabited country, that defendant was bound to settle with plaintiff and pay him the amount found to be due: *Held*, that such charge was not erroneous. *Dunn v. Hereford*, 206.

RULES

OF THE

SUPREME COURT OF WYOMING TERRITORY.

OF ATTORNEYS AND COUNSELORS.

RULE 1.—No person shall be admitted to practice as an attorney or counselor at law in this court unless he has served a regular clerkship within this territory with some practicing attorney of known abilities, and been admitted to practice in the district court for one of the judicial districts for at least one year. Or unless he has been admitted to practice in some one of the states or territories of the United States, or district, circuit, or supreme court of the same, and produces a certificate under the seal of such court, and is a citizen of the United States, or has declared his intention to become a citizen of the United States, of good moral character, and shall take and subscribe such oath as is, or may be, provided by statute.

OF MOTIONS.

RULE 2.—Motions shall be made by counsel in the order in which their names stand on the record; but no one is to make more than one motion until all others have had an opportunity.

RULE 3.—When a motion is founded on a matter of fact, which is not admitted or apparent on the record, it must be in writing, and supported by affidavit.

OF CALLING THE DOCKET.

RULE 4.—On the first day of the term the docket shall be

called and cases arranged for argument, or otherwise disposed of. In all cases of appeals, where there is no appearance on the part of the appellant, or where there is an appearance, but the case not ready for argument by the counsel for the appellant, the counsel for the appellee may submit the cause or have it dismissed.

OF MOTIONS FOR NEW TRIAL IN THE DISTRICT COURTS.

RULE 5.—No case will be heard in court unless a motion for a new trial shall have been made in the court below in which all matters of error and exceptions have been presented, argued, and the motion overruled, and exceptions taken to the overruling of said motion, all to be embraced in the bill of exceptions. Provided, that where actions are dismissed by reason of a demurrer to plaintiff's petition being sustained, that it shall be sufficient to carry the case up by filing a certified copy of the record with the briefs of counsel.

OF ATTORNEY'S BRIEFS.

RULE 6.—No case will be considered by this court until copies of the briefs, either printed or plainly written, of attorneys on both sides, shall be presented to the court; or if either side neglects or refuses to furnish a copy of his brief, the case will be heard and determined upon the one presented. Attorneys upon opposite sides will be required, upon notice or request, to interchange briefs, at least five days before the first day of the term.

OF TRANSCRIPTS.

RULE 7.—The appellant shall, in all cases, cause the transcript to be paged, and the lines of each page to be numbered. He shall also cause marginal notes to be placed on the transcript in their appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, if any, orders of the court, and the bills of exceptions; also, where the evidence is set out by depositions or otherwise, the names of the witnesses. The appellant, as also the appellee, where he shall assign cross-errors, shall, in

his brief, refer specifically to the record by page and line for any and every matter relied upon as error.

OF THE DUTIES OF THE CLERKS.

RULE 8.—The clerks shall enter upon the court docket, in a proper column, the fact, where such is the case, that the appeal was taken in term, and duly perfected by filing the record within the time limited.

When the appeal is not taken as above, the clerk shall note the date at which it was taken, and also note the fact whether or not the proper notice was given to the appellee.

The clerk shall, on opening of court each day, read the journal entries of the preceding day, that any errors occurring therein may be corrected. The chief justice shall at the end of each term of court, or as soon thereafter as may be, sign the journal for such term.

OF ARGUMENTS.

RULE 9.—The counsel having the affirmative, or the one who takes the appeal or writ of error, shall be entitled to the opening and closing. In his opening he shall present all the authorities and points on which he relies; the counsel opposed shall then be heard and shall present all his authorities and his defense generally, and the counsel for the appeal, writ of error, or affirmative as the case may be, shall conclude. The counsel on either side of a case shall not occupy in argument exceeding ninety minutes, except by special leave of the court, obtained before arguments are commenced.

OF DISTRIBUTION AND DECISION OF CAUSES.

RULE 10.—After causes have been argued and are ready for examination by the court, they shall be distributed to the several judges, and a record will be kept of such distribution. But no cause shall be decided by less than a quorum of the court, nor shall an opinion be filed speaking for all, or for a majority of the court, until it shall have been read in the hearing of all, or a majority thereof.

OF THE ORDER OF ENTERING CASES ON THE DOCKET.

RULE 11.—Cases shall be entered on the court's docket according to seniority ; and when a case is called in its regular order and the parties are ready to proceed, it may be passed once by consent ; but on or after the third day of the term, when a case is called a second time and both parties are not ready it shall be placed at the foot of the list and not heard until all other cases are disposed of ; but on the second call, if either one of the parties insist on proceeding with the argument, the case shall be taken up and disposed of unless sufficient cause shall be shown to justify the court in passing the case for the time.

OF UNPERFECTED APPEALS, ETC.

RULE 12.—When notices of appeals or writs of error have been filed and undertakings entered into in the district courts—but where the appellants or parties applying by writs or petitions in error fail to enter their appeals or to properly enter their errors in this court, the appellee or defendant in error by himself or counsel may apply to the court on or after the first day of the term for a rule on the appellant or plaintiff in error to be served on him or his counsel on the record in the court below, to show cause why the appeal or writ or petition in error should not be stricken off and the judgment affirmed. Also, on a rule on the sureties in the undertaking to show cause why the judgment should not be entered against them for the amount of the judgment below, together with costs and damages.

Upon the taking of such rule, the court shall fix a day (during the term) for the return and hearing on the rule ; and if no sufficient cause be shown to the contrary, the rule shall be made absolute, and the clerk shall certify the proceedings to the district court, from whence the record should have come, and said certificate shall (showing the amount of the judgment, including interest, cost and damages allowed) be a sufficient *procedendo* for the issuance of execution.

OF RETURN OF WRITS OF ERROR.

RULE 13.—Upon the return of a writ of error to the clerk of this court, said clerk shall notify the attorney of record of the plaintiff in error in writing by mail (keeping a record of the date of such notice) that twenty days are allowed in which he is required to file his list of errors relied upon on the argument of the case in this court. And in the event of there being no attorney of record in this territory, then such notice may be made in the same manner upon the plaintiff in error. And in the event of the non-residence of both plaintiff in error and attorney, then the notice shall be by publication in a daily newspaper, published at the capital of this territory, by three insertions in said paper; and the twenty days to begin to run from the date of said notice and date of last publication.

OF FILING BRIEFS.

RULE 14.—That, with the opinion of the court in each case decided, there shall be filed the briefs handed to the court in the case, the same to remain on file like other files, and not to be withdrawn without special order.

OF PRINTING BRIEFS.

RULE 15.—The briefs prescribed by Rule 6 shall hereafter be printed, and according to the rule existing in the United States supreme court respecting briefs used before it; the reasonable expense of the printing to be taxed to the prevailing party.

OF ERROR AND APPEAL BOOKS.

RULE 16.—The error book and appeal book may hereafter be printed by the plaintiff in error or appellant in his election. The printing shall be according to the rule existing in the United States supreme court, in cases pending before it on error or appeal. The reasonable cost of the printing shall be taxed to that party, if he prevails.

OF AMENDMENTS.

RULE 17. These rules may be altered or amended at any regular term of the supreme court.

RULES

OF THE

DISTRICT COURTS OF WYOMING TERRITORY.

OF THE ADMISSION OF ATTORNEYS.

RULE 1.—When any person shall make application for admission to practice in this court (except practicing attorneys from other states and territories who shall be permitted by rules of courtesy to practice in certain cases) as an attorney-at-law, the court shall appoint a committee of not less than three members of the bar, who shall examine the applicant, and if, after such examination, the committee shall make a favorable report as to the competency of the applicant, including the statutory requirements, he may be admitted on taking the required oath. Practicing attorneys coming from the states or territories to reside here may be admitted on producing a certificate from the court where they last practiced, upon satisfying the court as to their learning capacity and good moral character. Provided, judges of the supreme court of the territory who, at the expiration of their term of service, shall be admitted on application.

OF OPENING OF COURTS, SETTLING THE DOCKET, ETC.

RULE 2.—The first day of each term, or so much thereof as shall be necessary, shall be devoted to organizing the grand jury, calling the dockets, hearing motions, and entering judgments in cases of default where a jury is not required. The amount in all cases of money judgments, taken by default of the defendant, shall be ascertained by compu-

tation made by the clerk. Provided that the said cases may be continued by the court notwithstanding the defendant's default.

OF PASSING CASES ON THE DOCKET.

RULE 3.—A case when called may be passed, by consent of both parties ; but if so passed it will not be taken up until all other cases are disposed of, except by the unanimous consent of the bar and permission of the court. But if either party refuses to consent to passing the cause it shall be taken up in its order, unless sufficient cause be shown to the contrary.

OF CONTINUANCE OF CASES.

RULE 4.—All motions for the continuance of cases shall be presented in writing, supported by affidavit of the party (his agent or attorney), applying therefor, stating the facts on which the motion is founded, unless they appear on the record. If the motion be based on the want of testimony of an absent witness, the party making the affidavit shall state therein what he expects to prove by such witness, and also what acts of diligence he has used to procure his testimony. If the court finds the testimony to be material, and due diligence has been used, the cause may be continued upon such terms as are hereinafter provided, or as shall appear to the court to be just and proper.

In all cases where the application for a continuance is based upon reasons known to the party or his attorney, at the commencement of the term, the motion shall be filed on or before the second day thereof ; if not known until after the commencement of the term, it shall be filed at such time as shall be fixed by the court.

OF HEARING OF ²⁷MOTIONS FOR CONTINUANCES.

RULE 5.—On the hearing of the motion for a continuance, the affidavit in support thereof will be taken as true ; and no contradictory, supplemental or amended affidavit, or statement, will be permitted unless by special leave of the court.

OF MATTERS AS OF COURSE.

RULE 6.—All cases and matters pending in court at any time and not otherwise disposed of during the term, will stand continued as of course.

OF DEFAULT IN PLEADING.

RULE 7.—A party in default of pleading, may, on good cause shown, file the same within such time, and upon such terms as the court shall order, upon showing by affidavit or otherwise that he has good cause of action or a meritorious defense, as the case may be, and the pleadings prepared to be filed shall be presented to the court with the affidavit.

OF DEPOSITIONS.

RULE 8.—In all cases where depositions are suppressed, and the court, on examination of the same, shall find them to be material, the cause shall be continued for that term, on the application of the party whose depositions are suppressed, unless the objections to the depositions be waived, but no continuance for defect of the depositions of the same witnesses shall be allowed more than once.

OF DILATORY MOTIONS.

RULE 9.—No mere dilatory motion will be allowed to be made in any case at issue after the first day of the term, except motions to dismiss, for want of jurisdiction and for a continuance of the cause.

OF FILING PAPERS.

RULE 10.—Every paper filed in a cause shall have indorsed thereon the name of the paper and the cause to which it belongs, and the name of the attorney filing the same. When not so indorsed the paper may, on motion, be stricken from the files.

OF MOTIONS.

RULE 11.—All motions not of course shall be made in writing, specifying cause for the same, and when founded on matters of fact not appearing in the pleadings, or other

proceedings in the case, must be supported by affidavit, which shall be filed with the motion. And no motion will be heard except by special order of the court, unless written notice thereof shall be served upon the opposite attorney at least three days prior to the time fixed for such hearing, if the attorney lives in the same county, or at least five days prior thereto if the attorneys live in different counties.

OF THE HEARING OF MOTIONS.

RULE 12.—Attorneys in attendance on the court will be called on by name alphabetically each morning, for the entry of motions and disposal thereof, and no attorney will be heard on any motion except when his name is called in its regular order. Provided, that this rule shall not apply or be in force during the trial of a cause.

OF JUDGMENTS BY DEFAULT.

RULE 13.—When a default has been entered for want of an appearance, of a plea, or from any other cause, it will be set aside only upon an affidavit of merit, and of diligence, or explaining satisfactorily the want of diligence.

OF APPEARANCES.

RULE 14.—All causes in which no counsel shall be entered on the docket, and no appearance is entered when the case is called for trial, shall be dismissed. Provided, that nothing in this rule shall be so construed as to prevent a suitor from appearing and conducting his own case.

OF NOTICE TO PRODUCE PAPERS.

RULE 15.—Notices to produce papers to be used on a trial must be in writing when served on the opposite party, and the same notice will be required as stated in Rule 11, unless barred by special order of court.

OF THE AMENDMENT OF PLEADINGS.

RULE 16.—A party having obtained leave to amend a pleading, who fails to do so within the time limited, shall be considered as electing to abide by his former pleading.

And in no case of amendment shall the original pleading be withdrawn from the files, or obliterated, unless leave be given to substitute the amendment for the original pleading; nor shall the amendment be made by erasure or interlineation, except by special leave of the court.

OF DEPOSITIONS IN TERM TIME.

RULE 17.—Depositions to be used in this court shall not be taken in term time except by consent, unless the court, for special reasons, shall otherwise order. A motion for leave to take depositions during any term of the court shall be in writing, and shall state particularly the reasons for taking them, which application shall be supported by affidavit.

OF THE ORDER OF TRIAL OF CAUSES.

RULE 18.—Causes will be called for trial in the order in which they stand upon the docket, and parties will be required to be in readiness for trial at any time at which the cause shall be reached.

OF THE DUTIES OF THE CLERK.

RULE 19.—At least five days before the meeting of the court at the beginning of a term, the clerk shall enter upon the judge's docket (and shall also prepare a similar list for the use of the bar) a list of all cases to be tried, arranged according to seniority. And when said list is called over at the commencement of the term and a case is not ready for trial, it shall be passed to the foot of the docket, and not again called until all other cases are disposed of, without the unanimous consent of the bar present in court, with the permission of the court. Provided, that this rule shall not apply where either party insist on a trial.

OF AMENDMENTS OF PLEADINGS.

RULE 20.—Amendments of papers and pleadings in actions at law may be allowed on motion in writing at any stage of the cause; but no amendment shall be deemed good cause for a continuance, unless the amendment works a surprise

to the opposite party, and this shall be made manifest to the court by affidavit or otherwise.

OF ARGUMENTS BY COUNSEL.

RULE 21.—The counsel supporting the affirmative in any case, shall be entitled to begin and close in the argument of any cause or motion, and shall in his opening cite his authorities to the court and indicate his line of argument upon the evidence to the court and jury. The defense shall then open and cite the authorities relied upon, and also the points of evidence; and if more than one counsel for defense is to be heard they shall then make their arguments. The counsel for the affirmative shall then close, and shall not raise any new points either of law or evidence in such closing.

OF OBJECTIONS TO DEPOSITIONS.

RULE 22.—All formal objections to the introduction of depositions must be made in writing and before the case is called for trial—subject to the provisions of the statute in such case made and provided.

OF IMPANELING JURIES.

RULE 23.—Twelve jurors shall be called to the box and examined on their *voir dire*, if either party desires to so examine them. After the parties have passed for cause, in civil cases the plaintiff may challenge three jurors peremptorily, and the defendant may then challenge three peremptorily, and so on alternately until the jury is accepted or the peremptory challenges exhausted. Either party passing a challenge at the proper time to use it, shall be deemed to have waived the challenge.

In criminal cases punishable capitally, and in other felonies, the right of challenge shall be exercised as follows: First, the prosecution shall have one and the defense three, and so on until the jury be accepted or the challenges exhausted. Either party failing to exercise the challenge at the proper time shall be taken to have waived the challenge. But in either criminal or civil cases, neither party shall be

compelled to exercise any challenge unless the number of twelve shall be in the jury box at the time.

OF COMPUTATION OF JUDGMENTS.

RULE 24.—In all cases where no jury trial is had, the clerk of the court shall make all assessments of damages and computations of interest.

OF AGREEMENTS TO BE IN WRITING.

RULE 25.—No private agreement, stipulation or consent, between parties or counsel, in respect to any matter or proceedings in a cause, shall be alleged or suggested by either party against the other, unless the same is in writing and signed by the party against whom it is so alleged or suggested—or is entered into in open court and noted on the clerk's journal or upon the minutes of the judge.

OF COSTS IN CASES CONTINUED.

RULE 26.—In all cases where application for the continuance of causes set down for trial is made, except where the continuance is by consent, the party applying before the continuance be allowed, pay all costs which have accrued at the term.

OF INSTRUCTION TO JURIES.

RULE 27.—When the court is asked to instruct the jury in any cause, the instructions asked for must be prepared by the counsel of the respective parties, and submitted to the court (legibly and plainly written, on one side of the paper only, so that any one thereof may be detached and withdrawn from the others) before the commencement of the argument in the cause, or they will not be considered by the court. If required, the court will allow time before the argument is commenced for the preparation of the instructions asked.

RULE 28.—The clerk shall, immediately after the opening of court on each day, read the journal entries of the preceding day, that any errors occurring therein may then be corrected. The judge presiding shall, as soon after the adjournment of the term as practicable, sign the journal of the term.

OF CRIMINAL TRIALS.

RULE 29.—Trials in criminal cases will be at the term in which the indictment is found, unless cause for a continuance is shown by affidavit. The court in its discretion may receive oral or written statement of the prosecuting attorney for a continuance, in lieu of an affidavit.

OF PROCLAMATION IN JUDGMENTS BY DEFAULT.

RULE 30.—All proclamations of judgments by default, of forfeiture of bonds or recognizances, decrees in divorce cases, etc., shall be in accordance with forms to be approved by the court.

OF AMENDMENTS TO RULES.

RULE 31.—These rules may be altered, enlarged, or reduced from time to time by the supreme court.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

NOTES
ON THE
WYOMING REPORTS
VOL. I.

• INCLUDING THE CITATIONS OF EACH CASE AS A PRECEDENT (1) BY ANY COURT OF LAST RESORT IN ANY JURISDICTION OF THIS COUNTRY; (2) BY THE EXTENSIVE AND THOROUGH ANNOTATIONS OF THE LEADING ANNOTATED REPORTS.

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NOTES

ON THE

WYOMING REPORTS.

CASES IN 1 WYOMING.

1 WYO. 17, WESTERN U. TELEG. CO. v. MONSEAU.

Reversal of decision as against evidence.

Cited in Ketchum v. Davis, 3 Wyo. 164, 13 Pac. 15, holding that decision will not be reversed unless findings are so clearly against evidence as to show that court was improperly influenced; Rainsford v. Massengale, 5 Wyo. 1, 35 Pac. 774, holding that verdict will not be set aside unless clearly against weight of evidence, or not sustained by sufficient evidence.

1 WYO. 20, TERRITORY v. ANDERSON.

1 WYO. 21, JOHNSON v. MARION.

1 WYO. 22, MARTIN v. MOORE.

1 WYO. 25, LANNIER v. HAASE.

Motion to dismiss appeal as proper remedy.

Cited in Forec v. State, 14 Wyo. 296, 83 Pac. 596, holding that proper method of raising question that proceeding in error was not commenced in time is by motion to dismiss.

1 WYO. 27, UNION P. R. CO. v. HAUSE.

Liability for torts of independent contractor.

Cited in note in 65 L.R.A. 643, on general rules as to absence of liability of employer for torts of independent contractor.

Recovery of exemplary damages.

Cited in Denver & R. G. R. Co. v. Scott, 34 Colo. 99, 81 Pac. 763, holding that exemplary damages are not recoverable, where fireman is injured by jumping from locomotive because brakes did not work on down grade; Cosgriff Bros. v. Miller, 10 Wyo. 190, 98 Am. St. Rep.

977, 68 Pac. 206, holding that exemplary damages are recoverable in suit for trespass, when defendants repeatedly drove their sheep on plaintiff's land and pastured them there under care of armed men.

Excessive or insufficient verdicts.

Cited in Sutherland, Dam. 3d ed. 2810, on duty of court to set aside verdict which is so excessive or so small as to induce belief that jury have not given case fair and dispassionate consideration.

Cited in notes in 14 L.R.A. 681, on excessive verdicts in suits for personal injuries; 26 L.R.A. 394, on power of appellate court over verdict for excessive damages.

1 WYO. 36, MURRIN v. ULLMAN.

Necessity of exceptions in bill of exceptions to review of objections.

Cited in Johns v. Adams, 2 Wyo. 194; Boulter v. State, 6 Wyo. 66, 42 Pac. 606,—holding that grounds for new trial will not be considered by supreme court, unless presented to court below by motion for new trial and exception taken and embodied in bill of exceptions.

1 WYO. 37, GEER v. MURRIN.

Necessity of exceptions in bill of exceptions to review of objections.

Cited in Johns v. Adams, 2 Wyo. 194; Boulter v. State, 6 Wyo. 66, 42 Pac. 606,—holding that grounds for new trial will not be considered by supreme court, unless presented to court below by motion for new trial and exception taken and embodied in bill of exceptions.

1 WYO. 39, HORTON v. PEACOCK.

1 WYO. 40, SCOTT v. UNITED STATES.

Conflict of state and Federal jurisdiction.

Cited in note in 17 L.R.A. 721, on state jurisdiction over lands of United States within state.

Disapproved in Territory v. Burgess, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558, holding that territorial district court has jurisdiction over murder committed on military reservation.

1 WYO. 41, IVINSON v. TERRITORY.

1 WYO. 41, ROGERS v. LOWRY.

1 WYO. 42, ROGERS v. COLLINS.

1 WYO. 42, SEARS v. ALBANY COUNTY.

1 WYO. 42, WILSON v. O'BRIEN.

Necessity of motion for new trial to review of errors as to evidence.

Cited in *Ross v. State*, 16 Wyo. 285, 94 Pac. 217, holding that incompetency of witness cannot be considered an error, where it was not assigned as ground in motion for new trial, nor assigned as error.

1 WYO. 45, GREAT WESTERN INS. CO. v. PIERCE.**1 WYO. 51, WILSON v. ROGERS.****1 WYO. 57, HORTON v. PEACOCK.****1 WYO. 61, DONNELLAN v. NICHOLLS.**

Payment of money from treasury without legislative appropriation.

Cited in *State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125, holding that provision in act creating office of state examiner as to his salary operates as appropriation, so that no special appropriation by legislature is necessary.

Cited in note in 16 L.R.A.(N.S.) 633, on requisites of appropriation for official salary or expenses.

1 WYO. 67, WOLCOTT v. TERRITORY.

Criminal jurisdiction of justice of peace.

Cited in *People ex rel. Yearian v. Spiers*, 4 Utah, 385, 10 Pac. 609, holding that justice of peace has no jurisdiction over crime of resorting to house of ill-fame.

1 WYO. 71, IVINSON v. ALTHROP.

Liquidated damages.

Cited in *Sutherland*, Dam. 3d ed. 735, on favorable consideration of stipulation to liquidate where actual damages cannot be ascertained by any standard.

1 WYO. 78, FIELDS v. TERRITORY, 3 AM. CRIM. REP. 318.

Evidence of different offenses under one indictment.

Disapproved in *State v. Heinze*, 45 Mo. App. 403, holding that prosecution is not compelled to elect which of several offenses brought out in evidence it will go to jury on.

1 WYO. 82, PHILLIPS v. TERRITORY.

Reversal of conviction as against evidence.

Cited in *Cornish v. Territory*, 3 Wyo. 95, 3 Pac. 733, holding that conviction will not be disturbed where there is material evidence tending to support it.

1 WYO. 85, BROWN v. NASH.

Examination of legislative journals to determine validity of statute.

Cited in *Union Bank v. Oxford*, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *State ex rel. Cheyenne v. Swan*, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209; *State ex rel. Hynds v. Cahill*, 12 Wyo. 225, 75 Pac. 433,—holding that in determining whether statute has been constitutionally enacted, legislative journals are competent evidence to be consulted by courts.

Cited in note in 23 L.R.A. 344, on conclusiveness of enrolled bill.

Right of school districts to school moneys.

Cited in *Powder River Cattle Co. v. Johnson County*, 3 Wyo. 597, 29 Pac. 361, holding that taxes levied for support of schools of county are not taxes for county purposes, but fund so raised belongs to school districts.

1 WYO. 96, UNION P. R. CO. v. CARR.

Proper remedy to determine locus of assessment.

Cited in *Allison v. Hatton*, 46 Or. 370, 80 Pac. 101, holding that suit by taxpayers to restrain sale of lands for taxes is proper remedy to determine in which county plaintiffs' lands were subject to assessment.

Cited in *High*, Inj. 4th ed. 515, on right to injunction to prevent municipality from enforcing tax against property in another jurisdiction.

Invalidity of act illegally passed by legislature.

Cited in *Union Bank v. Oxford*, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; *State ex rel. Cheyenne v. Swan*, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209,—holding that where legislative journals show affirmatively that act was not passed with required formalities, such act is not a law.

Cited in note in 23 L.R.A. 344, on conclusiveness of enrolled bill.

1 WYO. 105, McGLINCHEY v. MORRISON.**1 WYO. 108, WILSON v. FIRST NAT. BANK.****1 WYO. 112, KINSLER v. TERRITORY.**

Reversible error in sentencing prisoner.

Cited in *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; holding that failure, in sentencing prisoner, to make inquiry whether he has anything to say, is not reversible error.

Asking what prisoner has to say.

Cited in *Abbott's Crim. Tr.* 2d ed. 752, on right of court, during term, to expunge sentence imposed without asking what prisoner has to say.

1 WYO. 114, WILSON v. TERRITORY.

1 WYO. 121, BRENNAN v. HEENAN.

1 WYO. 131, HAMILTON v. TERRITORY.

1 WYO. 137, LARAMIE COUNTY v. ALBANY COUNTY, Affirmed in 92 U. S. 307, 23 L. ed. 552.

Liability of divided county.

Cited in *Re Fremont & B. H. Counties*, 8 Wyo. 1, 54 Pac. 1073, holding that county, after loss of part of its territory, is responsible for indebtedness of original county at time of division, in absence of contrary constitutional or statutory provision.

Cited in note in 20 A. S. R. 677, on relation of new counties and their officers to old counties.

1 WYO. 143, MARTIN v. UNION P. R. CO.

1 WYO. 149, WALDSCHMIDT v. TERRITORY.

1 WYO. 155, WILSON v. TERRITORY.

Requisites of jurisdiction in contempt proceedings.

Distinguished in *Ex parte Bergman*, 3 Wyo. 396, 26 Pac. 914, holding that order to show cause in contempt proceedings, not styled in name of state, is not void, where defendant voluntarily submits to order without raising question of jurisdiction.

—Necessity of affidavit as to constructive contempt.

Cited in *People ex rel. Atty. Gen. v. News-Times Pub. Co.* 35 Colo. 253, 84 Pac. 912 (dissenting opinion), on necessity of affidavit, stating facts constituting constructive contempt; *Thomas v. People*, 14 Colo. 254, 9 L.R.A. 569, 23 Pac. 326; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961; *State v. Henthorn*, 46 Kan. 613, 26 Pac. 937,—holding it error to issue attachment, etc., for constructive contempt, without prior filing of affidavit of facts constituting contempt; *State ex rel. Thatcher v. Horner*, 16 Mo. App. 191, holding affidavit, stating facts as to contempt, necessary to validity of order punishing for contempt; *Cooley v. State*, 46 Neb. 603, 65 N. W. 799, holding that order to show cause is not sufficient foundation for proceedings for constructive contempt, where it fails to state facts constituting alleged offense.

1 WYO. 157, CARR v. WRIGHT.

1 WYO. 168, TERRITORY v. PIERCE.

Grounds for motion in arrest of judgment.

Cited in *McGinnis v. State*, 17 Wyo. 106, 96 Pac. 525, holding that fact that amended information was filed without leave is not proper ground for motion in arrest of judgment.

1 WYO. 172, BONNIFIELD v. PRICE.

Demurrer on ground that action is barred.

Cited in *Upton v. McLaughlin*, 105 U. S. 640, 26 L. ed. 1197; *Columbia Sav. & L. Asso. v. Clause*, 13 Wyo. 166, 78 Pac. 708,—holding that objection that action is barred by statute of limitations may be raised by demurrer, where it appears on face of petition.

Disapproved in *Price v. Bonnifield*, 2 Wyo. 80, holding that demurrer to petition, which shows on face that action is barred by statute of limitations, should not be sustained.

1 WYO. 178, IVINSON v. HUTTON, Reversed in 98 U. S. 79, 25 L. ed. 66.**1 WYO. 187, DOLAN v. CHURCH.****1 WYO. 190, HELLMAN v. WRIGHT.****1 WYO. 194, WAGNER v. HARRIS.****1 WYO. 202, BROWN v. ILGES.**

Jurisdiction over military reservations.

Distinguished in *Territory v. Burgess*, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558, holding that territorial district court has jurisdiction over murder committed on military reservation.

1 WYO. 206, DUNN v. HEREFORD.

Part performance of contract for services.

Cited in notes in 24 L.R.A. 232, on effect of part performance of contract for services; 5 L.R.A.(N.S.) 441, on right of wrongfully discharged servant to wages for contract period subsequent to discharge.

1 WYO. 210, REGAN v. JONES.**1 WYO. 213, GREGORY v. MORRIS, Affirmed in 96 U. S. 619, 24 L. ed. 740.**

Reversal for nonconformity of verdict in replevin to code.

Cited in *Ulrich v. McConaughy*, 63 Neb. 10, 88 N. W. 150, holding that failure of verdict in replevin to conform to code is not reversible error, if party complaining is not prejudiced thereby.

Rights of conditional seller.

Cited in note in 133 A. S. R. 568, on rights and remedies of conditional seller on buyer's default in payment.

1 WYO. 223, BONNIFIELD v. PRICE.

Conflict of laws as to statute of limitations.

Cited in *Parmele's Whart. Conf. L.* (3d ed.) 1247, on bar of debt outlawed by *lex fori*.

Cited in notes in 48 L.R.A. 644, as to when statute of limitations will govern action in another state or country; 4 L.R.A.(N.S.) 1031, on construction and effect of statute of forum admitting bar of statute of jurisdiction in which cause of action arises or accrues.

Res adjudicata.

Cited in *Gilmer v. Morris*, 30 Fed. 476, holding that judgment, sustaining demurrer on ground that action was barred, is no bar to second action.

1 WYO. 235, BOSWELL v. ALBANY COUNTY.

1 WYO. 240, BATH v. LINDENMYER.

1 WYO. 245, BONNIFIELD v. PRICE.

1 WYO. 246, FEIN v. UNITED STATES.

1 WYO. 251, IVINSON v. ALSOP.

1 WYO. 255, WOLCOTT v. FEE.

1 WYO. 259, RUMSEY v. WOLCOTT.

1 WYO. 263, DAYTON v. WYOMING NAT. BANK.

1 WYO. 270, IVINSON v. HANCE.

Exemption of public property from taxation.

Cited in *Cooley, Tax*, 3d ed. 135, on right of state to tax federal lands within state.

Cited in note in 22 Eng. Rul. Cas. 446, on exemption of public property from taxation.

Injunction against collection of tax.

Cited in *Cooley, Tax*, 3d ed. 1418, on power of court of equity to enjoin collection of illegal tax.

Cited in note in 69 A. D. 200, on injunction against collection of taxes and assessments.

1 WYO. 277, IVINSON v. PEASE.

1 WYO. 280, BATH v. INGERSOLL.

1 WYO. 284, ALSOP v. HUTTON.

1 WYO. 287, JENKINS v. CHEYENNE.

Nature of action for violation of ordinance.

Cited in *Huron v. Carter*, 5 S. D. 4, 57 N. W. 947, holding that action

for penalty prescribed by municipal ordinance for act, not criminal by law of state, is civil action.

Cited in note in 33 L.R.A. 44, on proceedings for violations of ordinances as prosecutions for crime.

1 WYO. 292, ALBANY COUNTY v. BOSWELL.

1 WYO. 301, TRABING v. ALBANY COUNTY.

Right to injunction.

Cited in note in 30 L.R.A. 568, on injunctions against judgment for matters subsequent to rendition.

1 WYO. 303, EMERY v. HAWLEY.

1 WYO. 307, UNION P. R. CO. v. WILSON.

1 WYO. 311, McCARTHY v. TERRITORY.

Sufficiency of indictment.

Cited in McGinnis v. State, 16 Wyo. 72, 91 Pac. 936, holding that indictment for robbery is fatally defective which fails to state ownership of property.

1 WYO. 316, GLAFCKE v. O'BRIEN.

Requisites of supersedeas.

Cited in Morton v. Western Seed & Irrig. Co. 2 Neb. (Unof.) 131, 96 N. W. 183, holding that to supersede judgment, transcript as well as petition in error must be filed in supreme court.

1 WYO. 317, JENKINS v. TERRITORY.

Necessity of proper record for review.

Cited in Boulter v. State, 6 Wyo. 66, 42 Pac. 606, holding that nothing which could have been assigned as ground for new trial will be reviewed, unless so presented in court below and excepted to and embraced in bill of exceptions.

1 WYO. 318, TERRITORY v. RITTER.

Liability of sureties on official bond.

Cited in Brandt, Suretyship, 3d ed. 1294, on liability of sureties on bonds of ex officio officers.

Cited in note in 91 A. S. R. 503, 579, on acts for which sureties on official bonds are liable.

Effect of making officer ex-officio officer of another office.

Cited in State ex rel. Davenport v. Laughton, 19 Nev. 202, 8 Pac. 344, holding that failure of lieutenant-governor to give bond as ex officio state librarian did not create vacancy in office of lieutenant-governor.

Distinguished in Reals v. Smith, 8 Wyo. 159, 56 Pac. 690, holding

statute, repealing act making treasurer ex-officio assessor, constitutional as against objection that effect of act was to remove person elected treasurer from office of assessor.

1 WYO. 336, WYOMING NAT. BANK v. DAYTON, Reversed in 102 U. S. 59, 26 L. ed. 77.

Reversal of decision as against evidence.

Cited in *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15, holding that decision of trial court will not be reversed, unless findings are so clearly against weight of evidence as to show that court was improperly influenced; *Rainsford v. Massengale*, 5 Wyo. 1, 35 Pac. 774, holding that finding of court on question of fact will not be set aside, unless not sustained by sufficient evidence or clearly against weight of evidence; *Hester v. Smith*, 5 Wyo. 291, 40 Pac. 310, holding that judgment will not be reversed in case of conflicting testimony, where there is evidence to sustain finding; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700, holding that court will not weigh evidence and decide which party has preponderance when matter has been properly submitted to jury.

1 WYO. 348, NORTH v. McDONALD, Affirmed in 154 U. S. 649, Appx. and 25 L. ed. 535, 14 Sup. Ct. Rep. 1,207.

Power of district court to nonsuit.

Distinguished in *Mulhern v. Union P. R. Co.* 2 Wyo. 465, holding that district court has no authority to order peremptory non-suit against will of plaintiff.

1 WYO. 352, BYRNE v. MYERS.

Reversal of decision as against evidence.

Cited in *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15, holding that decision of trial court will not be reversed, unless so clearly against evidence as to show that court was improperly influenced; *Rainsford v. Massengale*, 5 Wyo. 1, 35 Pac. 774, holding that verdict of court will not be set aside, unless not sustained by sufficient evidence or clearly against weight of evidence.

1 WYO. 355, UINTA COUNTY v. HINTON.

1 WYO. 355, MOSHER v. HILLIARD FLUME & LUMBER CO.

1 WYO. 356, JUBB v. THORPE.

1 WYO. 358, NAGLE v. RUTLEDGE, Writ of error dismissed in 100 U. S. 675, 25 L. ed. 772.

1 WYO. 361, FREEMAN v. CROUT.

1 WYO. 366, WILD v. STEPHENS.**1 WYO. 376, FEIN v. TERRITORY.****Malicious mischief.**

Cited in note in 128 A. S. R. 172, on malicious mischief.

1 WYO. 382, McCARTENEY v. WYOMING NAT. BANK.**Right of stranger to sue on contract.**

Cited in note in 71 A. S. R. 178, 202, on right of third person to sue on contract made for his benefit.

Assumption of partnership debts.

Cited in note in 9 L.R.A.(N.S.) 95, 96, on assumption of debts on dissolution of partnership.

1 WYO. 389, DEAR v. TRACY.**1 WYO. 392, PEASE v. TERRITORY.****1 WYO. 395, WHITE v. SISSON, W. & CO.****1 WYO. 396, HILLIARD FLUME & LUMBER CO. v. WOODS.****Vacation of verdict as against evidence.**

Cited in *Fein v. Tonn*, 2 Wyo. 113; *Fein v. Davis*, 2 Wyo. 118; *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15; *Rainsford v. Massengale*, 5 Wyo. 1, 35 Pac. 774; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700,—holding that verdict will not be set aside, unless not sustained by sufficient evidence or so clearly against weight of evidence as to be manifestly result of prejudice, etc.

Measure of damages for conversion.

Cited in *Sutherland*, Dam. 3d ed. 3295, on value at place and time of conversion determining measure of damages.

1 WYO. 413, LEE v. COOK.**Retroactive construction of statutes.**

Cited in *Larkin v. Saffarans*, 15 Fed. 147, holding that act of congress enlarging jurisdiction of circuit court will be construed to apply to cases pending, unless excluded by terms or necessary implication.

Cited in *Sutherland Stat. Const.* 2d ed. 643, on validity of retrospective statutes affecting remedies.



